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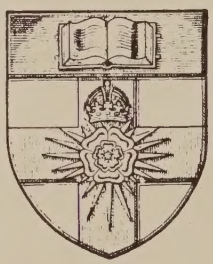

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLIX VICTORIÆ.

EX PARTE KEARSLEY. IN RE GENESE. 1886 Feb. 18.

Bankruptcy—Invalid Settlement—Majority of Creditors opposed to Litigation—Proceedings by Minority of Creditors to set aside Settlement—Motion—Vivâ voce Evidence—Practice.

When a minority of the creditors of a bankrupt are dissatisfied with the refusal of the trustee to take proceedings to recover property alleged to be part of the bankrupt's estate, and desire to institute such proceedings themselves, they must, in the first instance, apply to the trustee for leave to use his name, and offer him a proper indemnity. If he refuses, they are entitled to apply to the Court for leave to use the name of the trustee on giving him an indemnity against costs.

Vivâ voce evidence in support of a motion may be given at the hearing; but special leave for that purpose must be previously obtained.

MOTION to set aside a marriage settlement executed by the debtor.

It appeared that the debtor on his marriage in 1880 settled upon the usual trusts all the stock-in-trade on his business premises, and all the stock-in-trade that might thereafter come on his business premises in substitution for or in addition to the then existing stock-in-trade. His wife also put 800*l.* into settlement.

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In May, 1885, a receiving order was made against the debtor, and subsequently he was adjudicated bankrupt.

At the date of the receiving order all the stock-in-trade on the business premises of the bankrupt had been acquired by him since his marriage, and the trustees of his marriage settlement alleged that they had taken possession of it before the commencement of the bankruptcy.

Conflicting opinions of counsel were given as to the validity of the settlement with respect to the stock-in-trade, and the statutory majority of the creditors passed a resolution directing the trustee in bankruptcy not to take any steps to set aside the settlement. The dissentient minority, being trade creditors whose claims amounted to 18,000*l.*, wished that proceedings should be taken, and the trustee declining to move in the matter, they applied to the Court for a declaration that the settlement was void as against the trustee in bankruptcy. Their notice of motion also asked that vivâ voce evidence might be given at the hearing in support of the motion.

E. C. Willis, Q.C., and *Muir Mackenzie*, for the motion.

H. Reed, for the trustees of the settlement, took the preliminary objection that the applicants had no locus standi. The trustee represents *all* the creditors, and any application must be made by him or in his name. If he refuses to act, or to allow his name to be used, the creditors can apply to the Court for leave to use his name on indemnifying him against costs. That is the settled practice. It is not alleged here that the trustee has refused to allow his name to be used.

E. C. Willis, Q.C. It has never been laid down that the trustee alone must apply to the Court: *Ex parte Sidebothom* (1); *Ex parte Sheard.* (2) Even an individual shareholder can apply: *Ex parte Emmanuel.* (3) All the creditors are now before the Court, and the applicants are in fact seeking to set aside the fraud of the majority, who are loan creditors and friendly to the bankrupt.

There is nothing in the Act or the Rules which requires that

(1) 14 Ch. D. 458. (2) 16 Ch. D. 110.
(3) 17 Ch. D. 35.

leave to make this application should first be obtained. If leave be necessary, the applicants ask that the motion may stand over with liberty to apply for leave to use the name of the trustee on giving him an indemnity.

Kisch, for the trustee in bankruptcy, referred to s. 89 of the Bankruptcy Act, 1883, and asked for directions in the matter.

Cave, J. I am of opinion that the wrong course has been adopted here. Two questions arise on this motion. First, whether it ought to have been made at all; and, secondly, whether it can succeed. Now the proper course for creditors, if the trustee refuses to act, or to allow his name to be used, is for them to come to the Court and apply for leave to use the name of the trustee on giving him an indemnity against costs. On such an application the Court will consider the nature of the proposed proceedings, and, if satisfied that there are primâ facie grounds for allowing the creditors to proceed, will grant the application. But it is monstrous that any creditor, however small the amount of his debt, who is dissatisfied with the conduct of the trustee, should be at liberty to launch a motion like this. Such a course is full of inconvenience, is not supported by any authority, and must not be adopted. The case of *Ex parte Sheard* (1), which was much relied on in the arguments, has really nothing to do with this case. All that was decided there was this: there had been a change of trustee pending the appeal, and the Court of Appeal directed the appeal to stand over to give the creditors an opportunity of deciding whether they would by their new trustee adopt and prosecute the appeal. It did not decide that any creditor might take up the appeal as his own, and it certainly was never intended in my judgment to lay down the rule that any creditor, however impecunious, could apply to the Court for an order in the terms of this notice of motion. The proper course, as I have said, is to make a preliminary application for leave to use the name of the trustee on indemnifying him against costs.

The notice of motion is also wrong in another respect. It asks for leave to give vivâ voce evidence on the hearing of the motion.

(1) 16 Ch. D. 110.

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As a general rule there would be no objection to the evidence in support of a motion being given vivâ voce at the hearing. But leave to use vivâ voce evidence must be obtained on a separate application made before the motion comes on to be heard, and before all the expense of affidavit evidence has been incurred.

In this case the motion must stand over with liberty to the applicants to apply for leave to use the name of the trustee on giving him a proper indemnity. I reserve all questions of costs.

Order accordingly.

Solicitors: *R. Raphael; F. Kent; A. E. Rosenthal.*

H. L. F.

Feb 20.

EX PARTE FOX. IN RE SMITH.

Bankruptcy—Computation of Time—Priority of Debts—Wages or Salary—"Four months before date of receiving Order"—Interim Receiving Order—Official Receiver's Accounts—Objection by Trustee—Practice—Bankruptcy Act, 1883, *ss.* 40, 70 (*sub-s.* 3), 101—*Bankruptcy Rules*, 1883, *r.* 249.

In the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40, sub-s. (*b*),—which directs that the wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding 50*l.*, shall be paid in priority to all other debts,—the four months are those "next" before the date of the receiving order; and where an interim receiver has been appointed, the four months are to be computed from the date of the order appointing the interim receiver.

When the trustee in bankruptcy is dissatisfied with the accounts rendered to him by the official receiver he should make a report thereon to the Board of Trade pursuant to the 249th rule of the Bankruptcy Rules, 1883; and if the Board neglect or refuse to act in the matter, he should then apply to the Court for directions under s. 101 of the Act.

APPLICATION by the trustee in bankruptcy for an order directing the official receiver to repay to the estate the amount paid by him to clerks and workmen of the bankrupt.

It appeared that on March 6, 1885, a bankruptcy petition was presented against the debtor. On the 13th the official receiver was appointed "interim receiver" of the debtor's estate and the hearing of the petition fixed for July 9, the debtor being then in Australia. On July 9, the hearing was adjourned to August 21, on which day the debtor was adjudicated bankrupt and the official

receiver appointed "receiver" of the bankrupt's estate. The official receiver in distributing the property of the bankrupt paid in full the wages of some of his clerks and workmen to an amount less than 50*l*. The wages had accrued due during the four months prior to March 13, the date of the interim receiving order. On October 20 H. Fox was appointed trustee of the bankrupt's estate, and as other clerks and workmen of the bankrupt than those paid by the official receiver applied to him for payment in full of the wages due to them up to March 13, he applied to the Board of Trade for directions. He was informed in reply, that if he made the payments they would be allowed to him in passing his accounts; but being of opinion that only wages due for the four months next before the date of the actual receiving order, August 21, were payable, he made the present application to the Court.

Wedderburn, for the trustee. The question is, whether the words "receiving order" in s. 40 of the Act include an "interim receiving order." The section must be construed according to its plain grammatical meaning. A "receiving order" was made on August 21, and "during four months before the date of the receiving order," must mean the four months "next before" August 21. Therefore wages which accrued before April 21 could not be paid in full.

[CAVE, J. In clause (*a*) of s. 40 the words "next before" are used.]

The words "four months before the date of the receiving order" sufficiently express the meaning of the section without the addition of the word "next." If they mean "any four months before" that date, then a servant who had left the debtor's service nearly six years before the bankruptcy could claim the payment of four months wages in full.

Muir Mackenzie, for the Board of Trade. The words of clauses (*b*) and (*e*) do not in their ordinary meaning restrict the four months to the period "next before" the date of the receiving order. The legislature may have intended any four months before the date of the receiving order. The use of the words "next before" in clause (*a*) and their omission from clauses (*b*) and (*e*) would seem

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to support this construction. But if this view be erroneous, it is contended that a "receiving order" includes an "interim receiving order." The date to be considered is the date when the official receiver is constituted "receiver" of the bankrupt's estate, and whether it is by an interim order or an order absolute in the first instance is immaterial. Here the official receiver took possession of the bankrupt's estate on March 13, and the four months must be computed from that date. The adjournment of the hearing of the petition was the act of the Court, and ought not to operate so as to deprive persons of the priority which the section was intended to give them. Again, the motion is misconceived. The duties of the official receiver as to the debtor's estate are prescribed by sub-s. 3 of s. 70 of the Act. Then the 249th rule directs that he is to account to the trustee in bankruptcy. If the trustee is dissatisfied with the accounts which are rendered to him by the official receiver, he ought to report to the Board of Trade in the manner directed by the 3rd sub-section of the same rule. If the Board of Trade decline to act he could then apply to the Court under s. 101 for relief, and the Court could make an order to which the Board of Trade would be bound to give effect.

Wedderburn, in reply. As to the last point, the 249th rule is not obligatory. It says the trustee "may"—not "shall"—report to the Board of Trade; and these payments were made by the official receiver as trustee, and the Court has an independent jurisdiction in such matters. This is an application by the trustee under s. 89 of the Act. The words "receiving order" do not mean "interim receiving order." The terms are distinct.

Cave, J. This is a motion calling upon the official receiver to shew cause why he should not pay over a certain sum of money to the trustee which he has paid to certain servants in respect of services rendered by them to the bankrupt. The question turns upon the construction first of s. 40 of the Act. That section says, "all wages or salary of any clerk or servant in respect of services rendered to the bankrupt during the four months before the date of the receiving order not exceeding 50*l*.," shall be paid in full. The question is, what is the meaning of the words

"services rendered to the bankrupt during the four months before the date of the receiving order?" On the part of the trustee, it is said that taking those words in their natural meaning, and in the natural order in which they are used, the services must be services rendered to the bankrupt during the four months next before the date of the receiving order; and if they are rendered during a period without that term, they are not within the section. On the other hand, it is said they must be services rendered to the bankrupt, but all that is required is, that they should be rendered before the date of the receiving order, and during four months. This is an inversion of the order of the words, and an exceedingly awkward expression. Assume for the moment that August 21 is the date of the receiving order, and substitute August 21 for "before the date of the receiving order," then the section runs, "all wages of any servant in respect of services rendered to the bankrupt during four months before August 21." This would indicate that they must be rendered between April 21 and August 21. This seems to me the natural interpretation of the words in that order. Now take the order suggested by the official receiver, "All wages of any servant in respect of services rendered to the bankrupt before August 21, during four months." You cannot make, it seems to me, anything approaching good sense out of that. If you turn to the Act of 1869 you will find the expression was, "not exceeding four months." If that had been the language here, then, no doubt, there would have been no difficulty. "In respect of services rendered before the 21st of August, not exceeding four months' wages," would have been quite clear. But that expression has not been allowed to remain. It has been altered to "four months before the date of the receiving order," and I confess that needless difficulty seems to have been imported into the Act by a bad selection of words. If the words had been "in respect of services rendered to the bankrupt within four months before the date of the receiving order," there would have been no difficulty: or if it had been "during the four months *immediately* before the date of the receiving order," or, "during the four months *next* before the date of the receiving order," there clearly would have been no difficulty.

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Unfortunately, whoever drew up this clause has left out the word "within" and the word "next," which are actually in the paragraph immediately preceding, and instead of "within the four months next before" has altered the words to "during four months before." Still, looking at it with the view of getting the real meaning, I cannot help coming to the conclusion that it means that the wages must be due in respect of services rendered to the bankrupt during four months next before August 21. If that is so, these were not rendered during four months before August 21, and therefore it seems to me, putting the best construction I can upon needlessly difficult language, that the first contention on behalf of the trustee is right.

Then a second point is taken as to the date of the receiving order. The petition was presented on March 6, and if things had followed their ordinary course, a receiving order would in all probability have been made on March 13; but inasmuch as the debtor was in Australia, the 6th of July was fixed for the hearing of the petition. Then, in order to avoid the difficulties that might have arisen by leaving the estate unprotected during that period, an order was made appointing the official receiver interim receiver. That order was made on March 13, and the official receiver contends that this must be taken to be the date of the receiving order. It certainly is very difficult to understand the language of the Act. It says, "during the four months before the date of the receiving order;" and there is a receiving order, and it is dated August 21. On the other hand, if we were to hold that this construction is right, we should do away with all the benefit which artizans, servants, and clerks were intended to derive under the Act. It is obvious that if a receiving order is put off, from time to time, it may be put off so long a time after an interim order has been made that the servants cannot get any wages in respect of those four months. Why should they be placed at that disadvantage? Looking at the Act, it seems to me the meaning of it is pretty clear. So long as the actual receipts of the business are not interfered with, then you can go and get your wages as they fall due. The clerk can get his wages monthly, if paid monthly; quarterly, if paid quarterly; and so on. If he does not choose to get them at those

intervals, he must take the consequences if it turns out at the time when the receipts are taken out of the hand of the bankrupt, that there is more than four months owing to him. The proper time which common sense would seem to me to say should be fixed, appears to be the time when the receipts are taken out of the hands of the bankrupt. Up to that time the servants may go to him and demand their wages. If he does not pay they can bring an action against him. Having brought an action against him, and having got judgment, they can proceed to levy on his property. The moment anything in the nature of an order for a receiver is made, whether it is a receiving order or an interim receiving order, from that moment they are in an entirely different position. They cannot get the money from the bankrupt, because he is no longer in receipt of the profits from which to pay them. They cannot get the money from the interim receiver, because he says "I have got nothing to pay you with. I am merely a receiver, and I must go on paying the costs and expenses of the business. I will continue to pay your wages if you continue to serve; but as to past debts, I cannot interfere with them at all." Proceedings against the bankrupt would be stopped by an order, and even if that order were not made such proceedings could not be enforced because the property is in the hands of the interim receiver. Consequently they would be left in this position, that day by day as it went on they would see their right to their wages (there must always be some due to them because they never would be paid up actually to the time) slipping by, and as day by day went by, so day by day their wages would be disappearing, until at last at the expiration of four months they would find themselves with all their past wages gone, and they would have no remedy for them under the Act except to come in and prove with other creditors, and they would be deprived of their preference. Why should they under those circumstances be deprived of their preference? The business has been carried on for the benefit of the creditors undoubtedly. But they themselves have not been the cause of the delay, nor have they been able to prevent it. Yet it is said that they are to be deprived of what the legislature, as it has been shewn, intended to give them, a preferential claim to wages to the amount of four months from

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a particular date. I cannot help seeing that it is not precisely in accordance with the actual language of the Act to say that "the date of the receiving order" means the date of the order appointing an interim receiver. But looking at the difficulties which surround a literal interpretation and construction of the Act, I cannot but think that the legislature intended by the "receiving order" an order which would take the receipts out of the hands of the debtor and would leave him no longer the power of satisfying these claims. I admit that this is doing some violence to the language of the Act, but it seems to me that it is most in accordance with the spirit of it, and I therefore come to the conclusion, though with a considerable amount of doubt and hesitation, that it is the proper construction. It follows that this application must fail.

I should like to say a few words with reference to the other point, a point of practice; so that if it should occur again the parties may have the advantage of the point having been raised, and of knowing what the opinion of the Court is upon it. It seems to me that there is a power of control over the official receiver, and that that power can be exercised by the Court under the general clauses of the Act. But where a special course of procedure is pointed out with regard to any particular thing, you must follow that course of procedure and you must not go under the general provisions. It seems to me to be a very convenient course which is pointed out by rule 249. That rule directs, in the first place, that the official receiver shall account to the trustee. He does that and hands over the money he admits he has in his possession. Then it may be there is a difference between them, and that the trustee is not satisfied with the account furnished to him by the official receiver and thinks he has been crediting himself with certain sums which he ought not to have credit for. Thereupon sub-s. 3 says, "he may apply to the Board of Trade." In my opinion it is desirable that that application should be made. In the first place, because the official receiver is an officer of the Board of Trade, and also because this part of his duty, the receiving of assets and accounting for them, is one which falls peculiarly within the jurisdiction of the Board of Trade. It is hardly likely that in a case of

difficulty the official receiver would take upon himself to act without having fortified himself with the opinion of the Board of Trade. Even if he does so, it is desirable that application should be made to the Board of Trade to know whether they do or do not sanction and adopt the view taken by him. If they do not, then there is a simple course taken and they call upon him to refund this money. If they think it is a case where he should be called upon to refund it personally or provide it from other sources and pay it over, they say so. If they do adopt the action of the official receiver then I agree that s. 101 provides a very convenient mode of raising the question. You then might call upon the official receiver or the Board of Trade to shew cause why this sum of money should not be paid over. That course has this advantage, that whenever the Board of Trade declines to support the action of the official receiver the thing is set right without any expense being incurred, or any waste of money of the estate, and no legal proceedings are taken, and no costs are incurred until the parties really do know that they are at issue upon some particular point. Now it is not necessary to decide with regard to this particular case whether the proper course was taken or not, and I do not propose to do so. All I say is, that that is the course which ought to be adopted in a similar case—that where the trustee does object to the account rendered to him by the official receiver, he should first of all go to the Board of Trade and apply to them for relief. If he fails to get relief from them, he may then come to this Court and ask to have the question decided.

I am of opinion that the application fails on its merits and consequently must be dismissed with costs.

Order accordingly.

Solicitors: *J. Hill; W. W. Aldridge.*

H. L. F.

1886
Feb. 1.

[IN THE COURT OF APPEAL.]

FORD AND OTHERS *v.* THE METROPOLITAN AND METROPOLITAN DISTRICT RAILWAY COMPANIES.

Compensation—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68 —*Lands injuriously affected during the execution of the Works.*

Under the Lands and Railways Clauses Consolidation Acts the owner or occupier of lands injuriously affected during the execution of the works authorized by the special Act is entitled to compensation, if the injury is sufficient to lessen the value of the property.

Observations of Lord Chelmsford, L.C., in *Ricket* v. *Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175, at p. 194) commented on.

A house was divided into a front and a back block: and the plaintiffs were lessees of three rooms on the first floor in the back block. The lease did not expressly grant any mode of access. Access to the rooms demised to the plaintiffs was gained from the street by passing through a hall or vestibule, and then up some stairs to the plaintiffs' rooms. The defendants, in the exercise of compulsory powers under the Railways Clauses Consolidation Act, took down the front block of the house, and removed the hall. The interference with the hall and the injury to the access to the rooms of which the plaintiffs were lessees, lessened their value. An arbitrator having awarded compensation to the plaintiffs under the Lands and Railways Clauses Consolidation Acts:—

Held, that the award was valid on the grounds, first, that compensation may be obtained under the Railways Clauses Consolidation Act, 1845, for injury done to land by the execution of the works, if it is sufficient to lessen the value thereof: secondly, that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that an interference with this quasi easement was sufficient to give rise to a valid claim for compensation.

APPEAL from the judgment of Day, J., in favour of the plaintiffs in an action to recover 600*l.*, the amount awarded by an umpire appointed by the Board of Trade on the application of the plaintiffs under the Metropolitan and District Railways Acts, 1879 and 1881, and the Acts therewith incorporated, including the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

The plaintiffs occupied under a lease to them for seven years, from the 25th of March, 1880, three back rooms on the first floor of a house and premises, No. 73 Great Tower Street, London. No

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right of way was demised with the rooms, but the mode of exit was by going downstairs to a passage on the ground floor, and from thence through the front hall or vestibule of the house into Great Tower Street. The defendants, the railway companies, in execution of the works authorized by their said Acts of Parliament, pulled down and took away the front part of the house, including such hall or vestibule.

The plaintiffs claimed compensation in respect of the defendants having so pulled down such part of the house, and interfered with the plaintiffs' right of way and other easements, and having rendered their three rooms unfit for the purposes of occupation and of the business carried on there by the plaintiffs. The question of the amount of compensation was referred to arbitrators under the Lands Clauses Consolidation Act, 1845, and Railways Clauses Consolidation Act, 1845. By the award the sum of 600*l.* was awarded as the amount to be paid by the defendants to the plaintiffs, "by reason of the said rooms, easements, rights, and privileges having been injuriously affected by reason of the execution of the works authorized by the said Acts."

At the hearing of the arbitration the plaintiffs claimed compensation for the following heads of alleged injury: interference with the business of the plaintiffs, the refusal of brokers and customers to call while the alterations were going on, the inability of brokers and customers to find the plaintiffs' premises, the injury to samples through dust, the inability of the plaintiffs to carry on their business during part of the time of the execution of the works through want of water, the pollution of the water used by them for the purpose of tasting, the inability of the plaintiffs at times to light a fire or gas, damage to their premises and to their samples through smoke, the flooding of their premises by water from the water-closet and elsewhere, the difficulty of obtaining their letters in due time consequent on there being no housekeeper on the premises to receive and sign for registered letters, and the return of drafts on the defendants on the ground that the acceptors could not be found.

They also claimed compensation for the damage to the appearance of the premises themselves, the impossibility of having a housekeeper upon the premises, the inconvenience and loss

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accruing to the plaintiffs through such inability, the insecurity of the premises necessitating the removal day by day of securities and other valuables from the premises to the plaintiffs' bankers.

The solicitors for the plaintiffs also had made a similar claim in a letter written before the arbitration.

The defendants contented themselves with a general protest against the arbitrator finding and awarding any amount of compensation to be due to the plaintiffs; and they did not object specifically to any of the items claimed.

1885. Dec. 15, 17. *J. W. Mellor, Q.C.*, and *G. M. Freeman*, for the defendants. At the trial Day, J., was of opinion that the plaintiffs had suffered a wrong immediately that the defendants began to pull down the front part of the house: but the plaintiffs had only a way of necessity through the hall, and the right to a way of necessity ceases to exist as soon as the necessity for it ceases: *Holmes* v. *Goring* (1), cited in Gale on Easements, part I., ch. 4, sect. 2, p. 140 (5th ed.). In the present case the necessity for the mode of access through the hall ceased as soon as another right of way was substituted. The landlords could have done what the defendants have done without being liable to an action: there is no injurious affecting of the rooms demised to the plaintiffs, so as to give them a right of action. The claim put forward by the plaintiffs contains many heads of damage, which cannot be sustained, they being too remote; amongst these may be mentioned, the return of drafts because the postmen would not take the trouble to find the plaintiffs' rooms, the refusal of brokers and customers to call while the alterations were going on, injury from dust, inability to use water, pollution of water, inability to light fire and gas.

As to interfering with the passage to the plaintiffs' rooms, the plaintiffs had no right to have the vestibule kept for them. The plaintiffs had only a right to go across the vestibule, and their landlords had a right to interfere with the vestibule as they pleased, so long as sufficient space in it was left to enable the plaintiffs to get through it to the passage which led to the staircase to the plaintiffs' rooms. The case of *Gayford* v. *Moffatt* (2),

(1) 2 Bing. 76; 9 Moore, 166. (2) Law Rep. 4 Ch. 133.

which is very analogous to the present, shews that the plaintiffs could not acquire by user an easement over the vestibule: all that the plaintiffs could have, would be a right of way of necessity to their rooms, which right has not been interfered with by what the defendants have done: *Clifford* v. *Hoare* (1) and *Hinchliffe* v. *Earl of Kinnoul.* (2) Even if the defendants have not succeeded in maintaining all their points, yet as the whole of the money claimed, viz., 600*l.*, has been awarded to the plaintiffs, it follows that if any of the things in respect of which that sum was claimed be bad, the whole award is bad: *Beckett* v. *Midland Ry. Co.* (3)

[COTTON, L.J. How do you deal with *McCarthy* v. *Metropolitan Board of Works?* (4)]

There the Board of Works took away the plaintiff's use of the dock and so injuriously affected his interest in his premises.

Bray (*Murphy, Q.C.*, with him), for the plaintiffs. With regard to the vestibule, the plaintiffs were entitled to use that way in obtaining access to their rooms: *Pearson* v. *Spencer* (5), *Wheeldon* v. *Burrows* (6), and *Bayley* v. *Great Western Ry. Co.* (7) As to the general rules governing cases of this kind, "the first of these rules is," says Thesiger, L.J., in *Wheeldon* v. *Burrows* (8), "that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted." The injuries which the plaintiffs sustained, and for which they claimed compensation, were connected with their interest in land, the water pipes were cut and the supply of water taken away, and the chimney of their rooms which was interfered with formed part of the main building which was pulled down. "The obstruction by the execution of the work," says Lord Selborne, L.C., in *Caledonian Ry. Co.* v. *Walker's Trustees* (9),

(1) Law Rep. 9 C. P. 362.
(2) 5 Bing. N. C. 1.
(3) Law Rep. 1 C. P. 241.
(4) Law Rep. 7 C. P. 508; Law Rep. 8 C. P. 191; Law Rep. 7 H. L. 243.
(5) 3 B. & S. 761.
(6) 12 Ch. D. 31.
(7) 26 Ch. D. 434.
(8) 12 Ch. D. 31, at p. 49.
(9) 7 App. Cas. at p. 276.

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"of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation." The case of *Duke of Buccleugh* v. *Metropolitan Board of Works* (1) supports the plaintiffs' claim, as shewing that a right to compensation for land being injuriously affected may exist, though the land has not been taken or used for the works authorized by the Act. Here the value of the plaintiffs' rooms was diminished by the works of the company, so that the case was within s. 6 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and the plaintiffs therefore are entitled to compensation. It matters not that the injury was only a temporary one. If the plaintiffs' interest in their premises has been injuriously affected within the meaning of that section, the right to compensation arises for all the damage done whether temporary or permanent. In referring to *Ricket's Case* (2), Lord Selborne, L.C., says in *Caledonian Ry. Co.* v *Walker's Trustees* (3), "Much of Lord Chelmsford's reasoning was founded upon a distinction between temporary and permanent damage under the 68th section of the Lands Clauses Act (4), and the 6th and 16th

(1) Law Rep. 5 H. L. 418.

(2) Law Rep. 2 H. L. 175.

(3) 7 App. Cas. at p. 283.

(4) By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68, "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided, &c."

By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), it is provided: "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows:—

"Sect. 6. In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company

sections of the Railways Clauses Act, in which Lord Cranworth did not concur; and it certainly does not appear to me that the

shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company; and except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act, for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned Act shall be applicable to determining the amount of any such compensation and to enforcing the payment or other satisfaction thereof."

"Sect 16. Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or accommodation works connected therewith hereafter mentioned, to execute any of the following works (that is to say),

"They may make or construct, in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper:

"They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper:

"They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway:

"They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper:

"They may from time to time alter, repair, or discontinue the beforementioned works or any of them, and substitute others in their stead:

"They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway:

"Provided always, that in the exer-

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decision of *Ricket's Case* (1), either in this House or in the Exchequer Chamber, can satisfactorily be explained by any such distinction." *In re Penny* (2) Lord Campbell was of opinion "that the injury arising from vibration during the construction of the works was a proper ground for compensation;" and the cases of *East and West India Docks and Birmingham Junction Ry. Co.* v. *Gattke* (3), and *Wilkes* v. *Hungerford Market Co.* (4), are also authorities in support of a right to compensation in respect of temporary damage. In the present case, even if the arbitrator has given something for temporary damage, the Court cannot inquire into the amount which has been so given. The arbitrator could not award a larger sum than 600*l.*, because the plaintiffs did not claim more, though in fact they sustained damage to a greater amount.

Mellor, Q.C., in reply. Temporary damage cannot be the subject of compensation: *Ricket's Case* (1); and that case was approved of in *M'Carthy* v. *Metropolitan Board of Works.* (5)

Cur. adv. vult.

1886. Feb. 1. The following judgments were delivered:—

LORD ESHER, M.R. In this case an action was brought upon an award with respect to a claim made by the plaintiffs against the railway companies for compensation for injuriously affecting their property. At the hearing of the arbitration certain evidence was given and certain claims were put forward, and the arbitrator has made a general award. The arbitrator was not called as a witness at the trial, and there was no precise evidence as to which items of the plaintiffs' claim, on the evidence which was laid before him, he gave compensation; but it is alleged on behalf of the railway companies that the award is to be held bad, and that judgment is to be entered against the plaintiffs, on the ground that the arbitrator has given compensation for, at all events,

cise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

(1) Law Rep. 2 H. L. 175.
(2) 7 E. & B. 660, at p. 672.
(3) 3 Mac. & G. 155.
(4) 2 Bing. N. C. 281.
(5) Law Rep. 7 H. L. 243.

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some things with regard to which he had no jurisdiction to award any compensation. It is true that if the Court can see that an arbitrator has given compensation in respect of any part of the claim which is beyond his jurisdiction, judgment must be given against the plaintiffs, and the award must be treated as invalid. I regret that state of the law. Where it is clear that compensation has been given in respect of an item in excess of the jurisdiction, I regret that the Court cannot strike it out of the award and give judgment for that which is valid and good. But we must abide by the law as it stands.

Several points were urged as shewing that the claim was in certain particulars beyond the jurisdiction of the arbitrator. Some points with regard to these matters are quite clear: the mere personal inconvenience or injury, the mere injury to the business of the person claiming, must not be taken into account. In order to obtain compensation there must be some injury to property, and certain matters were laid before the arbitrator in this case which I think would be mere injury to the plaintiffs personally or to their business.

Some matters have been put forward which seem to me to be merely evidence of other matters which may be lawfully claimed; nevertheless, if I could see that the arbitrator had given specifically compensation in respect of those claims, the award must be treated as of no effect in this action. With regard to those matters which are mere personal inconveniences to the plaintiffs or injuries to their business, they are so slight that I feel wholly disinclined to come to the conclusion that the arbitrator has taken them into account, there being no evidence before us to that effect. It seems to me that his award may be amply sustained on the hypothesis, that he did not take into account those slight matters. The same may be said with regard to the matters, which are evidence of other matters lawfully claimed. Why should we suppose that the arbitrator treated those as specific claims, in respect of which he has given distinct sums, when in truth he may have considered them as evidence of the other matters? I will instance one matter which strikes me, namely, the absence of a housekeeper during the alteration of the building. That, to my mind, is evidence to shew that the building,

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as business premises, was rendered of inferior value, because if a building cannot be used as a business building to the same advantage as it was before, it is an injury to the building as a business building.

The chief point argued is this: it was urged that we were bound by authority to hold that if the arbitrator awards any compensation upon such a claim as this for injury, when it is injury only existing during the continuance of the work, and does not confine himself to injury which remains when the work is finished, the award is bad. That has always struck me as an exceedingly strange proposition—that compensation may be given for the injury which exists at the time when the work is finished, and yet that no compensation is to be allowed for the very same injury which exists during the progress of the works. That has always seemed to me to be a very fine distinction, which I could not understand; and when we look into the authorities, we find that it is based on an expression of Lord Chelmsford. I cannot help thinking that that expression, which has been cited from *Ricket* v. *Metropolitan Ry. Co.* (1), decided in the House of Lords, and has been relied upon as an opinion of Lord Chelmsford, is open to the explanation that it is a defective expression; he did not intend to say that which no doubt his words, primâ facie, seem to imply. But be that as it may, that expression of his, as has been pointed out, was not adopted by Lord Cranworth in the very same case, and certainly has been spoken of, to say the least, with doubt by Lord Selborne in *Caledonian Ry. Co.* v. *Walker's Trustees* (2). I cannot, therefore, take that expression of Lord Chelmsford's as a binding authority upon this Court, as a decision of the House of Lords. If that be so, we are driven back to principle. As I have said, I cannot believe that a fine-drawn distinction which seems to me unreasonable can be the law, and therefore I cannot think that the mere fact that the arbitrator has given some compensation for injury done before the works were completed, invalidates the award.

In my opinion the award is sufficient for the reasons which I have given; the action can be maintained upon it, and therefore this appeal must be dismissed.

(1) Law Rep. 2 H. L. 175, at p. 194. (2) 7 App. Cas. 259, at p. 283.

COTTON, L.J. I am of the same opinion. The award, to enforce which this action has been brought, was made under the 68th section of the Lands Clauses Act: the statutory right to compensation is alleged to be given to the plaintiffs by the 6th section of the Railways Clauses Act; the 68th section of the Lands Clauses Act only points out the machinery by which the amount of compensation is to be ascertained.

The contention before us has been that the award is bad. The first point taken, and really the only point that was taken, before the arbitrator was, that there was no case at all for the plaintiffs, that is to say, that having regard to what was done by the company there was no evidence that the plaintiffs were entitled to any compensation under the 6th section of the Railways Clauses Act, 1845. That protest was disregarded by the arbitrator, and the case went on before him. It will be material, on some points of the case, to consider how the objection was taken. It seems to follow necessarily from the mere words of the Act that to entitle any person to compensation under the 6th section of the Railways Clauses Act, there must be an injury to land which he owns or in which he has an interest, and I may read what was said by Lord Cairns when Lord Chancellor, in the case of *Metropolitan Board of Works* v. *McCarthy* (1), as really pointing out what now the rule is. The Lord Chancellor was stating what was argued by the late Lord Justice Thesiger, who was then counsel in the case, but he accepts it as really laying down the rule in these cases: "Mr. Thesiger stated that the test which he would submit as one which, he thought, would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." I read that because part of it is in favour of the contention of the present defendants, and lays down accurately the law as I understand it.

(1) Law Rep. 7 H. L. 243, at p. 253.

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What was the position of the present plaintiffs? They had a short lease of three rooms. The three rooms which they occupied were in what may be called the back block of the house. There were two blocks, one facing the street, and then a passage connecting the two blocks, and stairs went up into the back block, and the plaintiffs occupied three rooms on the first floor of that back block. But though the plaintiffs only had those three rooms in what I call the back block, they had the right as tenants of those three rooms of using the other part of the building. There was a hall with double doors and another set of double doors, and then there were a passage and stairs which led up to the plaintiffs' rooms. The railway company took away part of the house; they took away, as I understand, all the front block, and took away the hall, through which the plaintiffs had an exit to the street, and there was evidence that that interference with the building did materially affect the value of the rooms of which the plaintiffs had a lease. In my opinion it is perfectly clear that the protest made by the company before the arbitrator was wrong, and that some compensation ought to be made to the plaintiffs. I do not consider that any part of the property of which the plaintiffs had a lease, was taken away, but some property to which they had a substantial right granted to them by the owners and landlords of the house, namely, a right of going through the passage, being a matter connected with the use and enjoyment of those three rooms, was interfered with. The taking away and interfering with the property, if the evidence shews that it was injurious, is a matter which must affect the value of their interest in this land, and is not a mere matter of personal annoyance. Therefore the protest was wrong, and the contention, that the plaintiffs' claim was beyond the jurisdiction which the Lands Clauses Act and the Railways Clauses Act give to the arbitrator, must fail.

But if it were clear that the award has included claims in respect of which there is no right to give any compensation to the plaintiffs, the award must fail, and of course the judgment for the plaintiffs could not stand.

What was the first contention? It was argued that in estimating the amount which he thought the plaintiffs ought to have, the arbitrator took into consideration injuries to the building caused during the progress of the works, and it was argued that

as matter of law he had no right to give compensation, having regard to s. 6 of the Railways Clauses Act, for any injury, even although it was injury to the interests of the plaintiffs in this building, caused only during the progress of the works. It was admitted by counsel for the plaintiffs that in fact the arbitrator had taken into consideration injury caused during the progress of the works; as regards the law, I have looked carefully at the case quoted (counsel quoted no other), and at the opinion expressed by Lord Chelmsford in *Ricket* v. *Metropolitan Ry. Co.* (1) He says this, "The case was argued at your Lordships' bar both upon the 6th and 16th sections of the Railways Clauses Act, but in my opinion the 6th section is inapplicable. It relates 'to owners and occupiers of and all other persons interested in any lands taken and used for the purposes of the railway or injuriously affected by the construction thereof' (not in the course of the construction thereof); and the company is to make 'full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers vested in the company.'" Undoubtedly he says that this construction puts s. 6 out of the way, and that s. 16 must be considered. If that had been the ground on which *Ricket* v. *Metropolitan Ry. Co.* (2) was decided by the House of Lords, in my opinion, even although the present case did not come directly within the decision, we ought not to disregard the ground on which the House of Lords came to that conclusion; but Lord Cranworth did not agree with that, and Lord Westbury, who was overruled by the other two because he was of a different opinion from them on the main question, certainly did not assent to it; and in a later case before the House of Lords, *Caledonian Ry. Co.* v. *Walker's Trustees* (3), Lord Selborne, then Lord Chancellor, speaks with reference to this dictum of Lord Chelmsford, not in my opinion with approval: he says: "Much of Lord Chelmsford's reasoning was founded upon a distinction between temporary and permanent damage under the 68th section of the Lands Clauses Act, and the 6th and 16th sections of the Railways

(1) Law Rep. 2 H. L. 175, at p. 194. (2) Law Rep. 2 H. L. 175.
(3) 7 App. Cas. 259, at p. 283.

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Clauses Act, in which Lord Cranworth did not concur; and it certainly does not appear to me that the decision of *Ricket's Case* (1), either in this House or in the Exchequer Chamber, can satisfactorily be explained by any such distinction. But both those noble and learned Lords agreed that the damage by loss of custom of which the plaintiff complained, was a consequence of the works of the railway company, too remote and indefinite to bring it within the scope of any of the compensation clauses of the Acts." Both in that case and in other cases other judges have taken the same view of the decision in *Ricket's Case* (1), namely, that it turned not on the injury complained of being either wholly or partially caused by the course of the construction of the works, but on this, that the injury was so remote and so distantly connected with the loss sustained by Ricket that no compensation could be granted. We therefore have the authority of a judgment of the House of Lords, and the opinion of Lord Selborne, that what I have read from Lord Chelmsford's speech was not the ground of the decision in *Ricket* v. *Metropolitan Ry. Co.* (1), and in my opinion we ought not to consider that expression of opinion as an authority binding upon us, if, on the true construction of the section, we come to a different conclusion. In my opinion it would be wrong, and to take a very narrow view of this Act, to say that compensation for injury caused by the exercise of the powers vested in the company is to be confined to injury caused by the works when constructed. In my opinion the right to compensation ought to include also injury caused to the house, not only by the works when finished, but by the exercise of the powers of the Act in the course of putting up those works. By the Railways Clauses Act, 1845, s. 6, compensation is to be given for land "injuriously affected by the construction" of the railway; and I should say "construction" points to the actual construction of the works as well as to the works when constructed; but the compensation is to be granted for all damage sustained by the occupier by reason of the exercise as regards such lands of the powers by the Railways Clauses Act or the special Act vested in the company. I do not forget the expression "as regards such lands;" but in my opinion that must mean by works which

(1) Law Rep. 2 H. L. 175.

injuriously affect the lands, even though the lands are not taken, and which would be actionable if the Act of Parliament had not given powers to the railway company. Therefore in my opinion —and the Master of the Rolls has already expressed his opinion generally to the same effect—if injury is caused to the value of the building by that which is done while the works are being constructed, the owner or occupier or person having an interest is entitled to compensation in respect of his land and his interest in the land which are injuriously affected.

That really gets rid of the substantial objection to this award, because it was admitted that compensation for injury during the works was included in the amount of the award.

But then I come to another point. It has been urged that evidence was given which referred to injuries sustained by the plaintiffs personally, injuries sustained by them in carrying on their business, and that that evidence would offend against the law laid down by Lord Cairns in the passage which I read (and it was repeated by other judges), that the inconvenience or injury which arises solely from the particular use to which the particular occupier puts the building, must not be regarded. There was evidence undoubtedly relating to inconvenience of that kind, but are we to hold that the award included sums given for such matters? The course which the counsel for the company took prevents our having any assistance from, or expression of opinion by, the arbitrator; because instead of objecting to the evidence of matters which really were personal annoyance and interference with the particular trade, such as the water being in such a state that the tea could not be properly tasted, and such as the dust injuring the tea which they had, having protested once for all against the arbitrator proceeding to award any compensation, he did not object when evidence of particular claims was given, but allowed the evidence to be given without objection. Of course if it appeared that the arbitrator had given compensation in respect of matters for which he could not properly give compensation, that conduct of the company would have no effect; but it has had this effect, it prevents our knowing whether the arbitrator in his award did or did not consider the matter to which objection could be properly taken, as part of that which ought to be taken into

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consideration. It is said, that the sum awarded is so large that he must have taken those matters into consideration. I do not believe that. It is very true he awarded a large sum, but we are not to consider now whether in our opinion the sum was too large; what we have to consider is whether the arbitrator, before whom the parties went, has or has not acted within his jurisdiction. If he has, we have no power to interfere in any way. In my opinion, as the arbitrator was not called as a witness, and as nothing appears upon the award to shew that he has included these matters as by themselves entitling the plaintiffs to compensation, we ought not to set aside this award and to say that he has included matters which were not within his jurisdiction, simply because evidence was given with reference to such matters, some of which bearing on the injury to the house were admitted without any objection on behalf of the company.

There was another matter which I ought not to omit, in case it is said that it was passed over. No doubt a letter was written by the solicitors of the plaintiffs which did include matters in respect of which, in my opinion, no compensation could be given, but that is not conclusive to shew that the arbitrator took these matters into his consideration. The question which we have to decide is, whether this award is bad as being shewn by the railway company to include matters not within the jurisdiction of the arbitrator. In my opinion we ought not to come to any such conclusion, and therefore this appeal fails.

BOWEN, L.J. The first point which we have to consider is, whether injury or damage has been sustained by the plaintiffs which is properly the subject matter of compensation. It is perfectly well settled that in order to found a claim to compensation under the Railways Clauses Consolidation Act and the Lands Clauses Consolidation Act combined, there must be some injury to the house or land itself in which the person who claims compensation has an interest. As Lord Chelmsford said in *Metropolitan Board of Works* v. *McCarthy* (1), "a mere personal obstruction or inconvenience, or a damage occasioned to a man's trade, or the goodwill of his business, although of such a nature that but

(1) Law Rep. 7 H. L. 243, at p. 256.

for the Act of Parliament it might have been the subject for an action for damages, will not entitle the injured party to compensation under it." It remains to be considered what is the character of the damage or injury to the house or land, which will give rise to such a claim to compensation. The true distinction upon that point has been established in the House of Lords in *Metropolitan Board of Works* v. *McCarthy* (1), and is as follows: "That where by the construction of works there is a physical interference with any right public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if by reason of such interference the property as a property is lessened in value." We are driven therefore to consider what is the right, if any, in the present case which has been interfered with, and whether it has been interfered with so as to affect the selling value of the property as property within the definition to which I have alluded.

The facts have been set forth by my learned Brothers who have preceded me. The railway company have in fact taken away the hall through which access to the demised premises was gained by the plaintiffs, the claimants for compensation. What right of access had the claimants through the hall in its original state, and what title had they to complain if the hall, through which they passed, was so altered as to change the physical character of the access?

Now, it seems to me, that the access to the demised premises falls distinctly within the class of rights alluded to in *Wheeldon* v. *Burrows*. (2) By the grant of part of a tenement it is now well known there will pass to the grantee all those continuous and apparent easements over the other part of the tenement, which are necessary to the enjoyment of the part granted and have been hitherto used therewith. It was said that this mode of access was a way of necessity. That appears to me to be an imperfect statement of its character. A right of way of necessity is a right which arises by implication, but its true nature, and the distinctions

(1) Law Rep. 7 H. L. 243, at p. 253. (2) 12 Ch. D. 31.

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which obtain between the present right of access claimed and a right of way of necessity is explained in *Pearson* v. *Spencer*. (1) The present right, using the language of Lord Chief Justice Erle, falls under that class of implied grants "where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement." It was therefore a private right which the occupiers of those rooms were by law entitled to make use of in connection with their property, and I think there can be no question that the right gave an additional market value to the property. Has that right been interfered with according to the definition laid down in *Metropolitan Board of Works* v. *McCarthy*? (2) It is urged that the injury which was caused to the house by the taking away of the enjoyment of this hall, was an injury caused only during the progress of the works, and therefore was not such an injury as was intended to be compensated by s. 6 of the Railways Clauses Act, which provides for compensation being given for an injury done to lands by the construction of a railway. But the question seems to me rather to be what is the character of the injury inflicted, than what is the period during which it occurs. I cannot help thinking that on the plain reading of the Act of Parliament an injury may be done to houses and land, (if it is an injury sufficient to lessen the value of the property,) quite as fully during the progress of work, as by the works after they have been constructed; and although Lord Chelmsford's language in *Ricket* v. *Metropolitan Ry. Co.* (3) would seem to indicate a contrary opinion, I agree in the view which has been already expressed by the Master of the Rolls and Lord Justice Cotton, that that language was no integral part of the decision in *Ricket's Case*. (3) It has been doubted and explained by Lord Selborne in *Caledonian Ry. Co.* v. *Walker's Trustees* (4), and it seems to me that it cannot really at the present time be taken as established law. Compensation, therefore, was rightly claimed by the plaintiffs in this case in respect of the alteration of the hall, which formed the access to the demised premises.

(1) 3 B. & S. 761, at p. 767.
(2) Law Rep. 7 H. L. 243.
(3) Law Rep. 2 H. L. 175.
(4) 7 App. Cas. 259, at p. 283.

But it is said that the arbitrator has also taken into consideration certain other matters which were beyond the scope of his jurisdiction, and for which pecuniary compensation could not be properly assessed. It seems to me, upon the best consideration I can give to the case, that there is no proof at all that the arbitrator allowed any sum in respect of those matters of grievance. In one sense he considered them, because the matter in the absence of objection was placed before him in evidence: but that is not sufficient: it must be shewn in a case like this, not merely that the matter has been in the absence of objection admitted in evidence, but that the arbitrator really gave effect to the evidence in question, and allowed his mind, in the assessment of the sum which he had to assess, to be influenced or affected by the evidence which was accidentally before him. I have come to the conclusion that he did not do so, that the sum he has awarded is amply explained by the existence of the substantial matter of compensation which the plaintiffs are entitled to claim, and that, therefore, the award ought not to be disturbed.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Irvine & Hodges.*
Solicitors for defendants: *Burchells & Co.*

J. E. H.

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March 5, 24.

[IN THE COURT OF APPEAL.]

MIDLAND RAILWAY COMPANY, Appellants; WATTON, Respondent.

Local Government Acts—Public Health Act, 1875, ss. 4, 150, 257—"*Street*"—*Private Road—Turnpike Road—Apportionment of Expenses by Surveyor conclusive—Land, Part of which fronted Street and Part did not—Jurisdiction, erroneous exercise of by Surveyor not excess of.*

A private road may be a street within the meaning of s. 150 of the Public Health Act, 1875.

Where the apportionment of street improvement expenses by the surveyor under s. 150 of the Public Health Act, 1875, has not been disputed by a frontager in the manner pointed out by s. 257 of the Act, such apportionment is conclusive, and the frontager cannot set up, as a defence to proceedings for the recovery of the sum apportioned, that he has been charged in respect of a greater extent of frontage than he possesses.

So held, by the Court of Appeal, affirming the decision of the Queen's Bench Division.

The owners of a road put up bars upon it and took tolls from the public for the passage of vehicles, horses, and cattle:—

Held, by the Queen's Bench Division, that such road was not a turnpike road within the meaning of the exception contained in the definition of "street" given by s. 4 of the Public Health Act, 1875.

Case stated by a police magistrate under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, the facts of which were in substance as follows:—

The appellants had been summoned by the respondent, who was the collector of the West Ham Local Board, for non-payment of the sum of 1386*l.* 14*s.* 10*d.* apportioned by the surveyor of the said board as the appellants' share of the expenses of paving, &c., a street called the North Woolwich Road within the district of the said local board.

At the hearing of the summons the magistrate made an order for payment of the above mentioned sum as asked for, which order bore date the 8th of August, 1885.

The proceedings were taken against the appellants under the provisions of the Public Health Act, 1875, and of the 30th section of a local Act called "The Local Board of Health for West Ham in Essex Extension of Powers Act, 1867." This last-mentioned section in substance provided that, where the board had given

the notices provided for by the 150th section of the Public Health Act, 1875, and such notices had not been complied with, the board might direct their surveyor to apportion the estimated expenses of the proposed works of sewering, levelling, paving, &c., among the owners of the premises fronting, adjoining, or abutting on the street, and that such expenses so apportioned should be recoverable from the then present or any future owner either by action at law or in a summary manner at the option of the board.

All the proceedings with regard to notice to do the works and notice of the apportionment and demand of payment were duly taken, the date of the notice of apportionment being the 14th of February, 1885.

The facts with regard to the North Woolwich Road were stated by the magistrate as follows:—

The North Woolwich Road is a road which runs in a south-easterly direction from the Barking Road, in the district of the board, to North Woolwich, beyond the said district. There are on the southern side, for so much as is in the said district, buildings and lines of rails. On the opposite side of the road there are in many places continuous rows of houses and shops, the only access to which, except in places where there is a dedicated foot-path, is over the said road, and these rows are intersected by streets at right angles to the said road. The said road leads from and through a populous part of the district of West Ham to the docks and warehouses of the London and St. Katharine Docks Company.

The appellants are the owners of land and premises fronting, adjoining, or abutting on the said road.

It was proved and found by the magistrate that an association of gentlemen called the North Woolwich Land Company, who were the proprietors of the road in question, had erected gates or bars at several places along the said road, at which they demand and take sums of money fixed from time to time by the said company from persons using the carriage-way for vehicles, horses, and cattle. It did not appear that the North Woolwich Land Company ever exercised any choice or restriction in the kind of traffic passing along the road, or that they ever refused

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permission to any one to pass so long as such sums of money were paid. There was evidence that omnibuses were accustomed to pass along the road. Foot passengers are not charged, but use the footway without interference. The said North Woolwich Land Company have from time to time executed whatever repairs were done to the road, and have taken the sums of money aforesaid for a period of about thirty years.

It was also proved that some owners of frontage land pay equally with the public, but other such owners do not, and that the gates were existing and the moneys taken at the time of the proceedings. It was proved that such moneys were not taken by virtue of any Act of Parliament, but no evidence was given as to the authority of the North Woolwich Land Company to erect these gates or to take the moneys, nor of there being any obligation on them to repair the road. The road was made about thirty years ago.

The appellants contended that the road was not a street within the meaning of the Public Health Act, 1875, s. 150, or s. 30 of the local Act, and that the word "street" in those sections was not applicable to a private road over which the owners of frontage land had no right of user, and which neither they nor the local board had any legal right to enter or to do thereon the work for which the money was demanded, and where the repairs, if executed, would not be for the benefit either of those owners or of the general public, but only relieve the North Woolwich Land Company of the expense of repairing their private road.

The magistrate found as a fact that the North Woolwich Road was a street, and was not a highway repairable by the inhabitants at large, and also that it was not a turnpike road.

A further objection was taken on the part of the appellants. They contended that the amount apportioned by the surveyor to be paid by them could not be recovered because they had been assessed in respect of a large frontage part of which was separated from the said road by the Great Eastern Railway in one place and part in another place by the embankment that raised the road and the railway to the level necessary for passing over a swing bridge.

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The magistrate found that the appellants had given no notice to dispute the apportionment within the meaning of s. 257 of the Public Health Act, 1875, and that they had not taken the necessary steps to contest the apportionment under the 179th or 268th sections of the Public Health Act: and he therefore held that they were concluded by the apportionment, and declined to hear any evidence in contradiction thereof, or to allow the appellants to give evidence, which they tendered, as to the nature or position of their property, or to prove that part of it did not front the road. It not being disputed that they were the owners of some land fronting the road, he held that the evidence offered merely tended to shew that the surveyor had not correctly apportioned the expenses, which was a matter he had no jurisdiction to inquire into. He therefore made an order for payment of the sum claimed.

The questions for the Court were, whether there was evidence to support the finding that the North Woolwich Road was a street; whether the magistrate was right in holding that the surveyor's apportionment was conclusive; and whether he was right in rejecting the evidence tendered as aforesaid.

March 5. *Castle*, (*Jelf*, *Q.C.*, with him), for the appellants. First, the road in question was not a street within s. 150 of the Public Health Act, 1875, or s. 30 of the local Act. Different views have been taken of the meaning of s. 4 of the Public Health Act, 1875, which defines "street." It is submitted that the construction put upon the word by Jessel, M.R., in *Taylor* v. *Corporation of Oldham* (1) is too wide, for it would include every road, bridge, or footway, whether public or private. The word must be taken to be used in s. 150 in its natural and popular sense, as held by Lord Selborne in *Robinson* v. *Local Board of Barton Eccles* (2), approving of *Pound* v. *Plumstead Board of Works* (3), and *Baker* v. *Mayor of Portsmouth*. (4) It is not contended that a road in order to be a street must necessarily have houses all along it on both sides, but it must be a street in the ordinary popular sense, viz., a road dedicated as a public means of access to

(1) 4 Ch. D. 395.
(2) 8 App. Cas. 798.
(3) Law Rep. 7 Q. B. 183.
(4) 3 Ex. D. 4, 157.

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premises fronting upon it. It cannot include a road which the owner treats as private property, reserving all his rights over it and which he may close at any time. It is not shewn that the frontagers or the public had any right of access by this road, or that there had been any dedication to public purposes, which was held to be necessary by Bacon, V.C., in *Hall* v. *Corporation of Bootle*. (1) On the contrary, this road was simply the private property of the North Woolwich Land Company, which was shut off by bars, for the use of which they took toll, and from which they might legally, for aught that appears, exclude the public and the frontagers at any time. The frontagers would have no right to enter on the road to do the works required by the board.

Secondly, this is a turnpike road, and is within the exception in s. 4 of the Public Health Act, 1875. A turnpike road is a road over which gates are erected, and in respect of which tolls are taken. It is not necessary that the proprietors of the road should be acting under parliamentary powers: *Northam Bridge and Roads Co.* v. *London and Southampton Ry. Co.* (2) Roads of this kind are expressly recognised as turnpike roads by 4 Geo. 4, c. 95, s. 90.

Thirdly, the magistrate was wrong in holding the apportionment conclusive. The appellants are not liable under s. 150 in respect of land which does not front or abut on the street. It is not a mere question of apportionment but one of liability. The 257th section of the Public Health Act, 1875, makes the apportionment, if not disputed as therein provided, conclusive as to the amount but not as to liability. The owner of land which is severed from the street is in the same position as an owner who has parted with his property in the land assessed; and he has been held not to be liable: *Reg.* v. *Swindon Local Board*. (3) The surveyor exceeded his jurisdiction in charging the appellants in respect of land which did not front, adjoin, or abut on the street, and the apportionment was therefore void.

Wood Hill, (*Philbrick*, *Q.C.*, and *Phipson*, with him), for the respondent. There is abundant evidence that this is a street

(1) 44 L. T. (N.S.) 873. (2) 6 M. & W. 428.
(3) 4 Q. B. D. 305.

within s. 150, as interpreted by s. 4 of the Public Health Act, 1875.

Dedication of a street is not necessary to constitute it a street within the meaning of the Public Health Act, 1875. : *Vestry of St. Mary, Islington* v. *Barrett.* (1) A private street may be a "street" within the Act: *Taylor* v. *Corporation of Oldham.* (2)

This road is not a turnpike road. The mere taking of money for the privilege of passing over a private road does not constitute a turnpike road, and a person cannot, without legislative authority, dedicate a road to the public and reserve to himself the right to charge tolls for the use of it: *Austerberry* v. *Corporation of Oldham.* (3)

The appellants being frontagers, the surveyor clearly had jurisdiction to make an apportionment upon them, and such apportionment not having been disputed as provided in s. 257 of the Public Health Act, 1875, was conclusive and cannot be questioned: *Wake* v. *Mayor, &c., of Sheffield* (4); *Hesketh* v. *Local Board of Atherton.* (5)

Castle, in reply.

MATHEW, J. Our judgment must be for the respondent. The first point that arises is, whether the road in question is a street within the meaning of the Public Health Act. That is a matter of fact to be determined by the magistrate, subject to the question whether there was any evidence to support his finding. I am of opinion that upon the facts stated in the case there were ample grounds to justify the conclusion at which he arrived. It was argued that this road was not within the Act, because it was a private road; but it seems to me clear upon the authorities that private roads may be streets within the meaning of the Act, and that such a road as this comes within the definition given by s. 4 of the Act. It is said that it is excepted from such definition as being a turnpike road. Then is this road within that exception? I think not. In my opinion the exception was intended to apply to roads which were the subject of turnpike Acts. There was an excellent reason for excepting such roads

(1) Law Rep. 9 Q. B. 278.
(2) 4 Ch. D. 395.
(3) 29 Ch. D. 750.
(4) 12 Q. B. D. 142.
(5) Law Rep. 9 Q. B. 4.

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from the operation of the Act, because they were under the jurisdiction of trustees who would be bound to repair them. It appears to me that it would be incorrect to describe a road as a turnpike road, merely because the proprietors take tolls for the use of it as owners, without being subject to any statutory liabilities in respect thereof, such as are imposed on the trustees of turnpike roads.

The next point taken is that the appellants, though they were frontagers, were not frontagers to the extent of all the land in respect of which the apportionment had been made upon them, and that the magistrate ought to have admitted evidence for the purpose of shewing this, and have declined to make an order, if it were proved to be so. Under the Acts the expenses are to be distributed amongst the frontagers, and the extent of the liability of each frontager is to be ascertained by an apportionment to be made by the surveyor. The objection appears in effect to be that the extent of the liability of the appellants has been incorrectly estimated, and that the apportionment is wrong because they are made to bear a portion of the expenses, which should be cast upon their neighbours. But in the case of such an objection as that, the Act distinctly points out what course should be taken. The apportionment must be disputed in the manner pointed out by the 257th section, and such dispute settled by arbitration. The appellants have let the time go by for taking that course, and cannot dispute the apportionment before the magistrate. For these reasons I think that the appellants are wrong on both points, and that the order of the magistrate must be upheld.

A. L. SMITH, J. The first point raised by this case is, whether the North Woolwich Road is a street within the meaning of the 150th section of the Public Health Act, 1875. It seems to me that there is abundant evidence to shew that this road is a street within the definition given by Lord Selborne in the case of *Robinson* v. *Local Board of Barton-Eccles.* (1) But it was urged that it could not be a street, because it was a private road with gates upon it at which tolls were collected by the proprietors.

(1) 8 App. Cas. 798.

It appears to me that s. 150 applies to streets that are private property as well as to public streets. The view taken by Jessel, M.R., in *Taylor* v. *Corporation of Oldham* (1), seems to me to involve the conclusion that this is so, though the actual decision in that case related to the 16th section of the Act.

Then it was argued that this was a turnpike road, and so within the exception created by s. 4 of the Public Health Act. But I think that the turnpike road there intended is the well-known kind of turnpike road created and regulated under an Act of Parliament, and maintained by turnpike trusts. I should have been quite clear that this was not a turnpike road within the exception without authority, but it seems to me that the decision in *Austerberry* v. *Mayor of Oldham* (2) is an express authority for so holding.

The last point taken is that the appellants have been charged in respect of a larger frontage than they possess, because part of the land in respect of which they are charged does not adjoin or abut on the street. It seems to me that their remedy, if so, was to dispute the apportionment in the manner provided for by s. 257, and to go to arbitration on that dispute, and that not having done so they cannot on these proceedings object that the apportionment is wrong. The case of *Wake* v. *Mayor of Sheffield* (3) appears to me to shew that being frontagers on some portion of the street they cannot dispute their liability to pay the sum apportioned before the magistrate. For these reasons I think that our judgment must be for the respondent.

Order affirmed.

Against this decision the appellants appealed.

March 24. *Jelf, Q.C.*, and *Castle*, for the appellants. The North Woolwich Road is not a street within the provisions of the Public Health Act, 1875, or the local Act. The evidence shewed that this road was private property belonging to the North Woolwich Land Company in respect of which they took tolls, and which they would be entitled to close at any time. It is

(1) 4 Ch. D. 395. (2) 29 Ch. D. 750.
(3) 12 Q. B. D. 142.

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submitted that the provisions of the 150th section of the Public Health Act, 1875, do not apply to a case where there is no right of access to the street by the adjacent owners or the public. In this case there is nothing to shew that the user of the road was by virtue of anything but a mere licence, which it was competent for the owners of the road to revoke whenever they might please. This is shewn by the fact that they kept bars across the road and exacted tolls. The frontagers had no right to enter on the soil of the road to do the works required by the notices. It cannot be intended that the provisions of s. 150 should apply in a case where the frontagers have no right to do the works required.

[LORD ESHER, M.R. Can it be contended that it would be legal, or if legal, practically speaking, possible for the North Woolwich Land Company to close the road after allowing it to be used for the period and in the manner stated in the case? The question appears to be whether there was any evidence on which the magistrate might reasonably find this to be in fact a street.]

They cited on this point *Lord Pelham* v. *Pickersgill* (1); *Mayor of Portsmouth* v. *Smith* (2); *Taylor* v. *Corporation of Oldham* (3); *Baker* v. *Mayor of Portsmouth* (4); *Austerberry* v. *Corporation of Oldham.* (5)

Secondly, the magistrate was wrong in refusing to allow the appellants to dispute the apportionment. If the surveyor in making his apportionment charged the appellants as owners of lands that did not adjoin the street, he exceeded his jurisdiction. It must be admitted that, if the surveyor made an apportionment upon a person who owned no land adjoining the street, such apportionment would be made without jurisdiction and would be void. It is contended that the same result follows where an apportionment is made in respect of two plots of land, one of which adjoins the street and the other does not. The case is not within the provisions of the 257th section of the Public Health Act, 1875, which provides that the apportionment shall be conclusive unless notice to dispute the same shall be given in the

(1) 1 T. R. 660.
(2) 13 Q. B. D. 184; 10 App. Cas. 364, 375.
(3) 4 Ch. D. 395.
(4) 3 Ex. D. 4, 157.
(5) 29 Ch. D. 750.

manner specified in the section. Those provisions only apply where there was jurisdiction to make the apportionment.

[LORD ESHER, M.R. The appellants must admit that the surveyor had jurisdiction to make an apportionment of some amount against them. If so, it is only a question whether the amount is correct or not, and the case seems to come within the 257th section.]

The surveyor had no jurisdiction to include in the apportionment property that was not chargeable. They cited *Wake* v. *Mayor of Sheffield.* (1) (2)

Philbrick, Q.C., Wood Hill, and *Phipson,* for the respondent, were not called upon.

LORD ESHER, M.R. The first question that arises is whether there was evidence upon which the magistrate was entitled to decide that the North Woolwich Road was a street within the meaning of the Public Health Act. The definition given by s. 4 of the Act extends the meaning of the word "street," and makes it include more than it would according to its ordinary meaning; but I do not think it is necessary in this case to have resort to the extension of meaning given by the definition, because I think that there is evidence that this is a street according to the ordinary meaning of the term. It appears to be a long road running through a populous metropolitan district to certain docks and warehouses. There are buildings and rails on one side of it, and on the other side there are in many places continuous rows of houses and shops, though it may be that all the frontage on that side is not covered with buildings. It is used by public conveyances and by everybody who chooses to go along it, subject to the payment of tolls in the case of vehicles, horses, and cattle. In point of fact, nobody using it is ever stopped, whether there is power to stop persons using it or not. I think that it would be contrary to common sense and the common meaning of the word "street" to say that such a road as this is not a street. It seems to me most likely that there has been a dedication of some sort to the public; but the question whether that is so or not is in my

(1) 12 Q. B. D. 142.

(2) In the argument in the Court of Appeal the point that the road was a turnpike road was not taken.

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Lord Esher, M.R.

opinion immaterial if the road is a street. I will assume that it is a private road. It seems to me that a private road such as this, with premises on each side of it, the doors of which open into it, and which is used as this has been, is clearly a street within the 150th section of the Public Health Act. There is nothing in that section to limit the powers given thereby to any particular kind of street. Therefore I think that the authority was entitled to put in force the provisions of s. 150 of the Public Health Act, 1875, with regard to this street. That being so, it seems to me that the provisions of s. 30 of the local Act were applicable. Under s. 150 of the Public Health Act the expenses of the works cannot be charged upon the frontagers before they have been incurred. The reasonable interpretation of s. 30 of the local Act seems to me to be that under that section, wherever the street is one to which s. 150 would apply, the expenses of works intended to be done may be estimated, and such estimated expenses may be apportioned among the frontagers in the same manner as the expenses actually incurred are apportioned under s. 150 after the completion of the works. For these reasons I think that the authority was entitled under s. 30 to take the course it did with regard to this street.

But then another objection is taken. The appellants object that the sum apportioned against them is too large, because they have been treated as owners of more frontage than they possess. They say that they have been charged in respect of land part of which fronts or adjoins the street, and part of which does not. But what does that objection come to? Merely that the figure at which they are assessed is too high. The question seems to me to be whether the surveyor had jurisdiction to make the apportionment upon them. He may have had jurisdiction to make an apportionment upon them, though he may have made a wrong apportionment. If that be so, then it seems to me that the case comes within s. 257 of the Public Health Act. That section provides with regard to expenses of this kind that "where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless within three months from service of notice on him by the local

authority, or their surveyor, of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same." This case seems to come exactly within those words. If there has been an apportionment by the surveyor which he had jurisdiction to make, such apportionment is by the words of this section made binding and conclusive, unless disputed in the manner pointed out. Assuming that there is ground for the complaint which the appellants make as to the apportionment, unfortunately they have not taken the steps required by the section for the purpose of disputing such apportionment, and, therefore, as it seems to me, they are prevented from raising this objection, unless they can shew that the surveyor had no jurisdiction to make the apportionment. It was argued that there was an excess of jurisdiction by the surveyor in respect of part of the sum apportioned. But it seems to me that, if he had jurisdiction to make an apportionment against the appellants, which it is admitted he had, then the only possible objection is that he made such apportionment incorrectly; but that is only an erroneous exercise of jurisdiction, not an excess of jurisdiction. If he had made an apportionment on a person who was not a frontager in respect of any land, there would be an excess of jurisdiction, but that is not the present case. It was argued that the persons whose premises fronted on the street were not adjacent owners within the Act, because the owners of the soil of the street charge a toll for passage, but it seems to me that this has nothing to do with the question whether a person owns premises adjoining the street. It was further said that after all these expenses had been incurred the owners of the soil of the road might shut it up, or might take tolls in respect of these repairs. But I have no doubt that the local board have ascertained their position, as representing the rights of the public, in this respect, and that either there has been a dedication, or else, after the repairs are done, the board will exercise their power to declare the road a highway under the 152nd section of the Public Health Act, 1875. For these reasons I think that the appeal must be dismissed.

LINDLEY, L.J. The first question in this case is whether there was any evidence that this was a street. Having regard to the

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statements in the special case, I see no difficulty in holding that there was such evidence. In fact, it seems to me perfectly obvious that this was a street. It was said that it was not a street, because some persons were made to pay tolls at particular points; but on the other hand others were not, and there was abundance of access to the road from side streets.

The other point is whether the magistrate was right in holding the apportionment to be conclusive. That appears to depend on the question whether the surveyor exceeded his jurisdiction or not. It seems clear that if he did exceed his jurisdiction the appellants are right, but if he did not they are wrong. It is admitted that the appellants do own some land adjoining or abutting on the street. That being so, the surveyor obviously had jurisdiction to make an apportionment upon the appellants; and it seems to me to follow that, though perhaps he made a mistake in the exercise of his jurisdiction, he did not exceed it. Without the decision in *Wake* v. *Mayor of Sheffield* (1) I should have come to that conclusion. Assuming that the surveyor did make some mistake in arriving at the amount with which he charged the appellants, I think that s. 257 points out the proper mode of getting such a mistake set right, and that the appellants have gone the wrong way to work. They should have disputed the apportionment in the manner provided for by that section.

LOPES, L.J. The first question is whether there was evidence on which the magistrate might reasonably find that this was a street. I adopt the definition of the term "street" approved of by Jessel, M.R., in the case of *Taylor* v. *Corporation of Oldham*. (2) He says, "The definition of a street is thus laid down . . . a street is properly a paved way or road; but in usage any way or road in a city having houses on one or both sides." It seems to me clear that, taking that to be the definition of a street, there was evidence in this case that this road was within the definition. It was argued that it was not a street because it was a private road. But the case of *Taylor* v. *Corporation of Oldham* (2) is a distinct authority that it is immaterial for this purpose whether a road is private or public. And the case of *Austerberry* v.

(1) 12 Q. B. D. 142. (2) 4 Ch. D. 395.

Corporation of Oldham (1) clearly seems to shew that such a road as this may be a street.

The other question is whether the surveyor's apportionment was conclusive. The appellants say that he has made the apportionment upon them in respect of too large a frontage. For the purposes of this question it must be taken to be admitted that this is a street, and that the appellants are frontagers in it. That being so, it seems to me that the terms of the 257th section apply, which provide that the apportionment shall be conclusive, unless disputed in the manner provided for by the section.

The board have complied, as it seems to me, with all the requirements of the Act, an apportionment has been made, and the appellants have not disputed such apportionment in the manner provided for by the section. Therefore, I think the magistrate's decision on that point was correct. It seems to me that the case of *Wake* v. *Mayor of Sheffield* (2) is a strong authority on this question, and that the concluding part of the judgment of the Master of the Rolls in that case is as much in point as anything could be.

Judgment for respondent.

Solicitors for appellants: *Beale & Co.*

Solicitors for respondents: *Hillearys & Layard.*

(1) 29 Ch. D. 750.

(2) 12 Q. B. D. 142.

E. L.

1886
April 19.

FLINTHAM AND OTHERS, PETITIONERS; ROXBURGH, RESPONDENT.

Municipal Election—Town Councillor, Qualification of—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 11, *sub-s.* 3; *s.* 51—"*Qualified to elect*"—*Unqualified Person on the Burgess Roll.*

The Municipal Corporations Act, 1882, s. 11, sub-s. 3, provides that every person shall be qualified to be elected and to be a councillor who is at the time of election qualified to elect to the office of councillor :—

Held, that a person who, though not qualified to be a burgess, had been enrolled on the burgess roll and was therefore entitled to vote under s. 51 of the Act, was not thereby qualified to be elected a councillor under s. 11, sub-s. 3.

CASE stated upon a petition against the return of the respondent to the office of town councillor of the borough of Aldeburgh by the commissioner to whom the trial of the said petition was assigned.

The facts were in substance as follows :—

The election was held on the 2nd of November, 1885, when the respondent was declared to be elected.

The petition alleged that the respondent was not qualified to be elected to the office on the ground that he was not entitled to be enrolled as a burgess of the said borough by reason of his not having complied with the requirements of s. 9 of the Municipal Corporations Act, 1882, sub-s. 2, clauses *b*, *c*, *d*, and *e*, and that he was not resident beyond seven miles but within fifteen miles of the said borough, or entered in the separate non-resident list directed by the said Act to be made, and prayed that the election might be declared void.

The borough was not divided into wards. The respondent was and had been since the month of October, 1880, the owner of a house in the borough. The respondent was enrolled as a burgess in the burgess roll in force at the time of the election in respect of the said house as qualifying property. The respondent was not before, or at, or after the time of the election, entitled to be enrolled as a burgess as required by s. 11, sub-s. 2 (*a*) of the said Act. The respondent was not, on the 15th of July, 1885, nor had he been during the whole of the then last preceding twelve months, in the occupation joint or several of the said house as

required by s. 9, sub-s. 2 (*b*) of the said Act. The respondent had not during the whole of those twelve months resided in the borough or within seven miles thereof as required by s. 9, sub-s. 2 (*c*) of the said Act. The respondent was not before, or at, or after the time of the election resident beyond seven miles but within fifteen miles of the borough, nor was he entered in the separate non-resident list directed by the said Act to be made as respectively required by s. 11, sub-s. 2 (*b*) of the said Act.

The respondent had not succeeded to the said property by descent, marriage, marriage settlement, devise, or promotion to a benefice or office within the provisions of s. 33, sub-s. 1, of the said Act.

The respondent was not a person prohibited by law from doing any act in the 51st section of the said Act mentioned within the meaning of sub-s. 3 of the last-named section.

The respondent was not qualified to be elected as councillor unless he was so qualified under the provisions of sub-s. 3 of the 11th section of the Act by reason only of his being enrolled as a burgess in the burgess roll, and not being prohibited by law from doing any act in the 51st section of the said Act mentioned.

The commissioner decided, subject to the opinion of the Court on the case, that the election was void.

The question for the Court was whether the respondent, by reason only of his being enrolled in the burgess roll and not being a person prohibited by law from doing any act in the 51st section mentioned, was at the time of the election a person qualified to elect to the office of councillor, and therefore qualified to be elected a councillor within the meaning of the 3rd sub-section of the 11th section.

Charles, Q.C. (*C. C. Scott* and *Day* with him), for the respondent. The case turns on the meaning of the 3rd sub-section of s. 11 of the Municipal Corporations Act, 1882, which provides that every person shall be qualified to be elected and to be a councillor who is at the time of election qualified to elect to the office of councillor. The respondent was qualified to elect to the office of councillor, for he was on the burgess roll, and s. 51 of the Act provides that a person who is on the roll shall be entitled to vote.

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The register is conclusive as to the qualification to vote. If a person is entitled to vote he must be qualified to elect. He cited *Stowe* v. *Jolliffe* (1), *Middleton* v. *Simpson* (2), and 43 Vict. c. 17.

James Fox, for the petitioners. The expression "qualified to elect" as used in the 3rd sub-section of s. 11 of the Act does not mean the same thing as "entitled to vote." It means having the electoral qualification described in s. 9, which sets forth the qualification of a burgess. The Municipal Corporations Act of 1882 was a Consolidation Act, and sub-s. 3 of s. 11 was taken from a previous Act of 1880 (47 Vict. c. 17), the sole object of which, as shewn by the title, was to abolish the necessity for a property qualification for the office of town councillor, and to assimilate the qualification for being a councillor to that for being a burgess. Sect. 51 was only intended to apply to the right of persons on the burgess roll to vote, and has nothing to do with the qualification for being elected. Sect. 41, sub-s. 2 of the Act would have no meaning if the contention for the respondent were correct. If the right to vote necessarily carries with it the qualification to be elected, as contended for by the respondent, then it would follow that the effect of s. 63 of the Act, which provides that with regard to the right to vote words importing the masculine gender shall include women, must be that women might be elected town councillors, which cannot be the case.

Charles, Q.C., in reply.

MATHEW, J. I am of opinion that the contention for the petitioners is correct, and that the respondent was not duly elected. It is argued for the respondent that, if he was entitled to vote, he was "qualified to elect" within the meaning of s. 11, sub-s. 3, of the Municipal Corporations Act, 1882. The question is whether that is the true construction of the sub-section.

Sect. 9 of the Act states the qualification necessary to entitle a person to be on the burgess roll. Sect. 11 then states the qualifications necessary to qualify a person to be elected a town councillor, and the proviso in sub-s. 3 is that every person shall be qualified to be elected and to be a councillor who is at the time of election qualified to elect to the office of councillor, thus

(1) Law Rep. 9 C. P. 734. (2) 5 C. P. D. 183.

making a uniform qualification for burgesses and councillors. The provisions of sub-s. 3 of s. 11 are substantially taken from the 43 Vict. c. 17, which is entitled an "Act to abolish the property qualification for members of municipal corporations and local governing bodies." The sole object of the enactment appears to have been to remove the disability occasioned by the non-possession of the property qualification. The provision must, as it seems to me, receive the same construction in the Act of 1882 as it would have received in the Act of 1880. So looked at, it does not bear the meaning contended for on behalf of the respondent. Other sections of the Municipal Corporations Act, 1882, considerably aid the construction we are putting on s. 11, sub-s. 3. Sect. 41, sub-s. 1, enacts that, if any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall be liable to a penalty, and sub-s. 2 provides that a person being in fact enrolled in the burgess roll shall not be liable to a fine for acting in a corporate office on the ground only that he was not entitled to be enrolled therein. Sub-s. 2 seems to involve the assumption that but for this provision, though he appeared on the burgess roll, he might be subject to the penalty as not being qualified. Again, attention was called to the provisions of s. 63, which provides that, for all purposes connected with and having reference to the right to vote at municipal elections, words in the Act importing the masculine gender shall include women. If the qualification to elect referred to in s. 11, sub-s. 3, be the same thing as the right to vote, it would follow that women would be entitled to be elected to the office of town councillor, because they have a right to vote. But it is clear that they are not so entitled, the terms of s. 63 being expressly limited to purposes connected with the right to vote.

A. L. SMITH, J. I am of the same opinion. The point is a very short one, though it involves some consideration of various sections of the Act. The question is whether the terms "qualified to elect" in s. 11, sub-s. 3, are equivalent to "entitled to vote." At first sight it seemed difficult to say that they were

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not, but I am nevertheless of opinion that as used in this statute they do not mean the same thing.

I will first of all consider what the meaning of the expression "qualified to elect" would be, if we had to consider ss. 9 and 11 together without reference to any other sections. Sect. 9 gives the qualification for enrolment on the burgess roll. Sect. 11 gives the qualifications for being elected to be a town councillor. The requisites of the latter qualifications, except in the case of a qualification under the proviso in sub-s. 3, are much heavier than those of the qualification for a burgess. But then by sub-s. 3 another and a lighter qualification is given. That sub-section is taken from the Act of 1880, to which I do not think it necessary to refer at length. It is thereby enacted that every person shall be qualified to be elected who is qualified to elect to the office of town councillor. If those two sections stood alone, it would be clear, I think, that this proviso referred to the qualification of a burgess as described in s. 9, and that it meant that any person qualified as described in s. 9 should be qualified to be elected a town councillor. Sub-s. 4 goes on to provide that any person qualified under the proviso shall cease to be qualified if he ceases to reside in the borough for six months, and his office shall become vacant, unless he was at the time of his election and continues to be qualified in some other manner. So far as these two sections go I should have thought the true construction of them was manifestly as contended for by the petitioners. But it is argued for the respondent that "qualified to elect" does not mean qualified as mentioned in s. 9, because by s. 51 it is provided that "at an election of councillors a person shall be entitled to subscribe a nomination paper and to demand and receive a voting paper and to vote, if he is enrolled in the burgess roll, and not otherwise." It is said that, though the respondent had not in fact any qualification to be a burgess, yet, because he happened to be on the burgess roll and so was entitled to vote, he was qualified to elect within the meaning of sub-s. 3 of s. 11. I do not think that is so. I think that s. 51 refers only to the right to vote as a burgess, not to the qualification of a councillor. It provides in effect with regard to the right to vote that a person on the roll may vote, unless prohibited by law for some reason,

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and that for that purpose there shall be no power to go behind the register. But it does not seem to me to have anything to do with the qualification for the office of town councillor, which depends on the effect of ss. 9 and 11 read together. It appears to me that the statute recognises the distinction between the right to vote and the qualification for being elected, because it provides in s. 63 that words importing the masculine gender shall include women, but limits the provision to purposes connected with the right to vote. It also seems to me that s. 41, sub-s. 2, aids the argument for the petitioners.

For these reasons I think that the fact that the respondent was on the burgess roll did not qualify him to be elected to the office of town councillor.

Judgment for petitioners.

Solicitors for petitioners: *Parker, Garrett, & Parker.*
Solicitors for respondent: *Stretton, Hilliard, Dale, & Newman.*

E. L.

THE QUEEN ON THE PROSECUTION OF ANN SMITH, RESPONDENT *v.* SHINGLER, APPELLANT.

April 9.

Bastardy—Practice—Appeal—Form of Notice of—7 & 8 *Vict. c.* 101, *s.* 4—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 2—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *ss.* 4, 6.

An appeal to sessions against an order made on a bastardy summons can, since the passing of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), only be brought subject to the conditions and regulations contained in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). The notice of appeal must therefore state the general grounds of appeal as required by s. 31, sub-s. 2, of that Act.

UPON appeal to the Birmingham Sessions against an order in bastardy the recorder quashed the order subject to a case.

It appeared that the appellant gave the respondent written notice of appeal to the sessions. The notice of appeal was served on her only, it did not contain any statement of the grounds of appeal, and no notice whatever of any grounds of appeal was given.

At the hearing of the appeal objection was taken on behalf of

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the respondent that the notice of appeal was bad, because it did not comply with the provisions of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 2 (1), but the recorder proceeded to hear the appeal.

The question for the opinion of the Court was whether it was necessary for the appellant to observe the procedure as to notice of grounds of appeal prescribed by the Summary Jurisdiction Act, 1879, s. 31. (1)

D'Eyncourt, for the respondent. The notice of appeal to the sessions was bad because it did not state the grounds of appeal as required by 42 & 43 Vict. c. 49, s. 31, sub-s. 2. (1)

A right of appeal was given in bastardy cases by 7 & 8 Vict. c. 101, s. 4 (2) but the Summary Jurisdiction Act, 1884 (47 & 48

(1) 42 & 43 Vict. c. 49:

Sect. 31: "Where any person is authorized *by this Act or by any future Act*, to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions he may appeal to such court subject to the conditions and regulations following . . . .

"(2.) The appellant shall, within the prescribed time, or if no time is prescribed, within seven days after the day on which the said decision of the Court was given, give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal;"

Sect. 32: "Where a person is authorized by any past Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations contained in this Act with respect to an appeal to a court of general or quarter sessions:

"Provided that where any such appeal is in accordance with the conditions and regulations prescribed by the Act authorizing the appeal so far as the same is unrepealed, such appeal shall not be deemed invalid by reason only that it is not in accordance with the conditions and regulations contained in this Act."

Sect. 54 provides that the Act shall apply to orders in any matter of bastardy.

The words in italics in s. 31 and the two clauses of s. 32, above set out, have been repealed by 47 & 48 Vict. c. 43.

(2) 7 & 8 Vict. c. 101, s. 4, provides that the justices may adjourn the hearing of a bastardy case, fixes a limit of time within which the application must be made, and enacts that "if within twenty-four hours after the adjudication and making of any order on the putative father as aforesaid, such putative father give notice of appeal to the mother of the bastard child, and also within seven days give sufficient security, by recognizance or otherwise, for the payment of costs, to the satisfaction of some one justice of the peace, *it shall be lawful for such putative father to appeal to*

Vict. c. 43 (1)), repealed the provisions of that section relating to the mode of appeal, leaving, however, the words "it shall be lawful for such putative father to appeal to the general quarter sessions of the peace." Parts of ss. 31 and 32 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) are also repealed, so that the words "by this Act or any future Act" are struck out of s. 31, while the two first clauses of s. 32 are also repealed. The option therefore given by 42 & 43 Vict. c. 49, s. 32, has been abolished, and the decision in *The Queen* v. *Justices of Montgomeryshire* (2), which was a decision on the repealed provisions, is not an authority which can govern the proceedings in such cases since 47 & 48 Vict. c. 43 was passed. The preamble of the later Act shews that it was intended that there should be an uniform procedure, and though the right of appeal is given by 7 & 8 Vict. c. 101, the mode in which it must be exercised is prescribed by 42 & 43 Vict. c. 49, s. 31, which is by 47 & 48 Vict. c. 43, s. 6, applied to such an appeal.

Abrahams, for the appellant. It may have been the intention of the legislature, in 47 & 48 Vict. c. 43, to produce uniformity of procedure, but it has not abolished the option which, according to *The Queen* v. *Justices of Montgomeryshire* (2), exists as to the mode of appealing in such cases as this. Orders in bastardy are made under the Acts relating to bastardy, and not under the Summary Jurisdiction Acts, so that the right of appeal given by 7 & 8 Vict.

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the general quarter sessions of the peace to be holden after the period of fourteen days next after the making of the said order for the county, city, borough, or place for which such petty session may have been held; and the justices in such quarter sessions assembled, or the recorder, as the case may be, shall thereupon hear and determine such appeal. . . ."

The whole of the above section with the exception of the words in italics, has been repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43).

(1) 47 & 48 Vict. c. 43:

Sect. 4: "The Acts contained in the schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned."

The schedule contains in the first column "7 & 8 Vict. c. 101," and in column 3, "s. 4, from 'if within twenty-four hours' down to 'some one justice of the peace,' and from 'to be holden after,' to the end of the section;" also in the first column, "42 & 43 Vict. c. 49," and in column 3, "In s. 31 the words 'by this Act, or by any future Act.' Sect. 32, down to 'in accordance with the conditions and regulations contained in this Act.'"

(2) 51 L. J. (M.C.) 95.

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c. 101, s. 4, still exists. Such an appeal is not limited by the conditions imposed by 42 & 43 Vict. c. 49, s. 31, sub-s. 2. 36 Vict. c. 9, s. 3, which is not repealed, preserves all existing rights of appeal. Although the provisions of s. 6 of 47 & 48 Vict. c. 43, are imperative, yet they are limited to appeals brought under 42 & 43 Vict. c. 49, and do not affect an appeal which is brought, as this appeal is, under the Bastardy Acts; for s. 32 of 42 & 43 Vict. c. 49 is permissive, and enacts that an appellant "may appeal." The principle of the decision in *The Queen* v. *Justices of Montgomeryshire* (1) applies, notwithstanding the repeal in 47 & 48 Vict. c. 43, of parts of ss. 31 and 32 of 42 & 43 Vict. c. 49.

LENMAN, J. The question for our decision is whether a person against whom an affiliation order has been made has a right to give notice of appeal against the order without stating in that notice the general grounds of his appeal as required by 42 & 43 Vict. c. 49, s. 31. Regulations as to appeals from bastardy orders are contained in 7 & 8 Vict. c. 101, s. 4. This section was not affected by 8 & 9 Vict. c. 10, s. 3, which dealt with recognizances, nor by 11 & 12 Vict. c. 43, for that Act did not apply to bastardy orders; but the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), dealt in ss. 31 and 32 with the procedure on appeals from courts of summary jurisdiction. Though the provisions of this Act were by s. 54 made applicable to orders in any matter of bastardy, still it did not repeal s. 4 of 7 & 8 Vict. c. 101. It was therefore decided in *The Queen* v. *Justices of Montgomeryshire* (1) that an appeal against a bastardy order could be brought either under the provisions of 42 & 43 Vict. c. 49, or under the previously existing Acts relating to bastardy, of which 7 & 8 Vict. c. 101, s. 4, was the one from which the right of appeal was derived. There was, therefore, an option, and there were two courses which could be pursued. This was clearly inconvenient, and it was to be expected that the legislature would amend the law so as to remedy this inconvenience. The Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), was accordingly passed, and it repealed a great part of s. 4 of 7 & 8 Vict. c. 101. It did not

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touch the clauses in that section which gave the right of appeal; but it repealed certain provisions as to the time for taking proceedings in appeals. The Act of 1884 further contained in s. 6 an express enactment that appeals from courts of summary jurisdiction authorized by any Act before the Summary Jurisdiction Act, 1879, should be brought subject to the conditions contained in that Act, and it repealed the words by "this Act or by any future Act" which stood at the beginning of s. 31 of the Summary Jurisdiction Act, 1879, while the first and second clauses of s. 32 of that Act were also repealed. There is now, therefore, a fairly clear code on this subject, and I am of opinion that the legislature intended by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), to put an end to the option which, as was decided in *The Queen* v. *Justices of Montgomeryshire* (1), existed in consequence of the use of permissive words in the Act of 1879. The clauses which gave the double right of appeal were repealed, and both the title and preamble of the Act of 1884 speak of uniformity of procedure, the preamble reciting that it is "expedient to provide for uniformity of procedure," while the title of the Act is an Act to make further provision for "the uniformity of proceedings;" but this uniformity would not be attained if it could be said that the option which it was established in *The Queen* v. *Justices of Montgomeryshire* (1) did exist, still existed notwithstanding the express enactments contained in 47 & 48 Vict. c. 43. I am of opinion that the law is now uniform with regard to cases of appeals from justices, in this respect at least, that the notice of appeal must state the grounds of the appeal.

This being so, this notice of appeal was bad, and we must give judgment in favour of the respondent, and quash the order of the recorder allowing the appeal.

DAY, J., concurred.

Judgment for respondent; order of sessions quashed.

Solicitor for appellant: *Harvey-Samuel.*

Solicitors for respondent: *Kingsford & Dorman, for Cheston, Birmingham.*

(1) 51 L. J. (M.C.) 95.

R. B. R.

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April 5.

IN RE THE STEPNEY ELECTION PETITION.
ISAACSON, PETITIONER; DURANT, RESPONDENT.

Parliament—Election—Right to vote—Aliens—Persons born in Hanover before the Accession of Queen Victoria.

Persons born in Hanover before the accession of Queen Victoria to the throne of the United Kingdom and not naturalized, are, though resident in the United Kingdom, aliens, and not entitled to vote at the election of members of Parliament.

Dicta in *Calvin's Case* (Coke Rep. part vii. at p. 46, 27 B) dissented from.

ON the hearing of a parliamentary election petition for the Stepney division of the borough of the Tower Hamlets, in which Isaacson was petitioner and Durant was respondent, Denman and Field, JJ., who heard the petition, considered that certain questions required further consideration by the Queen's Bench Division. They therefore postponed the granting of their certificate to the Speaker, and reserved the following questions for the Court, both parties agreeing that this would be the most convenient course.

The petitioner claimed the seat, and a scrutiny was held.

Among the counted votes objected to on both sides were the following:—

1. Nine votes of persons born in the kingdom of Hanover before the accession of Her Majesty Queen Victoria, and not naturalized.

2. Thirteen votes of persons born in the kingdom of Hanover since the accession of Her Majesty, of parents born in Hanover before that date.

3. One vote of a person born in Prussia since the accession of Her Majesty, of parents born in Hanover in 1802, and not naturalized.

The question reserved was whether all or any of these three classes of persons were aliens within the meaning of the law relating to parliamentary elections.

Mar. 29, 30. *Charles, Q.C.*, and *Jeune*, (*Richards* and *Isaacson*, with them), for the petitioner.

The learned judges have reserved certain questions for the

Court. They have not given judgment on the questions or on the petition.

[LORD COLERIDGE, C.J. This appears to have been done under 31 & 32 Vict. c. 125, s. 12. Was not that section intended to meet cases in which questions arose as to the admission of evidence and as to other points which under the old system were reserved at Nisi Prius as going to the root of the case?]

This is the course which was adopted in *Stowe* v. *Jolliffe*. (1)

[LORD COLERIDGE, C.J. That case was stated under 31 & 32 Vict. c. 125, s. 11, sub-s. 16. The question affects the right of appeal. If a case be stated under 31 & 32 Vict. c. 125, s. 11, sub-s. 16, then the decision of this Court is final, but in a case under s. 12 it is not final. But we will hear this case, as we are assured that both parties consent to our hearing it, and deciding it finally without any right of appeal unless by leave. It must be clearly understood that this course has been assented to, and this is the understanding on which we proceed. It appears that the petitioner contends that the first class of persons named, that is the ante nati, are not aliens, and are entitled to vote, so that we will first hear argument from the counsel for the respondent, who contends that they are aliens.]

Gully, Q.C., and *Asquith*, for the respondent. If the ante nati are aliens then all the others mentioned in the questions reserved are aliens, and if the ante nati are not aliens, then the post nati are not. But it is contended that those born in Hanover before the 20th of June, 1837, are aliens. The contention that they are not is based on certain dicta in *Calvin's Case* (2), for the decision in that case is not pertinent to the question now before the Court, and the sentence in that judgment that all born "under one natural allegiance while the realms were united under one sovereign should remain natural-born subjects, and no aliens," was only a dictum. Lord Coke used there the term "allegiance" in the sense of allegiance to the sovereign personally, but allegiance follows succession, so that on the separation of Hanover from England, owing to the operation of the Salic law, allegiance followed the succession. Moreover, allegiance and protection go

(1) Law Rep. 9 C. P. 734.

(2) Coke Rep. part vii. p. 46, 27 B; 2 How. State Trials, 559.

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together, for the decision in *Doe* d. *Thomas* v. *Acklam* (1) is not based on the fact alone that a treaty was made between England and America when the independence of America was recognised, but also on the theory of the connection between protection and allegiance. In 1837, therefore, Hanoverians came under the protection of the King of Hanover, and they owed allegiance to him, so that they became aliens as far as England is concerned. In the cases relating to America the persons whose nationality was in question remained in America, but that was not the ground of the decisions, which were really based on the fact that the two countries had become distinct sovereign states.

Charles, Q.C., and *Jeune*, for the petitioner. These persons being born before 1837, are not aliens, but it is admitted that if they are aliens the two other classes of persons are also aliens.

[LORD COLERIDGE, C.J. From 12 & 13 Wm. 3, c. 2, it would seem that persons born out of the United Kingdom would be aliens, and that statute is explained in 1 Geo. 1, stat. 2, c. 4.]

The earlier statute could not of course apply to Hanover, the later statute does not enact that persons born in Hanover after the accession of George I. to the throne of the United Kingdom shall be aliens. It is really a statute limiting the capacity of certain classes of persons to hold certain offices. Such persons were in fact natural-born subjects of George I., but with maimed rights.

The principles applicable to this subject are to a great extent to be found in *Calvin's Case* (2), in which the case of the possible separation of Scotland and England was considered both by Bacon in his speech (3), and by Lord Coke in his judgment, where he says (4), that "he that was by judgment of law a natural subject at the time of his birth," cannot "become an alien by such a matter ex post facto, and in that case upon such an accident our post natus may be ad fidem utriusque Regis, as Bracton saith." The decision in *Calvin's Case* (2) is in favour of the right of these ante nati to be considered not aliens, but subjects of the Queen, as is shewn by *Craw* v. *Ramsey* (5) where

(1) 2 B. & C. 779.
(2) Coke Rep. part vii. p. 1.
(3) 2 How. State Trials, at p. 593.
(4) Coke Rep. part vii. at p. 46, 27 B.
(5) Vaughan, 274, at p. 286.

Calvin's Case (1) is discussed, and it is stated that the reason of the resolution in that case was that the persons were born under the same allegiance as the subjects of England. The form of oath given in the report of *Calvin's Case*, in the State Trials (2), is that "you shall be true and faithful to our sovereign lord King James and his heirs," which shews that the allegiance was to King James and his heirs, and not to the King of England. The allegiance cannot be the same if one be to the named king and his heirs general, and the other to the named king and his heirs male; but if the allegiance is the same then there must be a right of election when the two Crowns are separated. These persons, therefore, could on the separation of the two Crowns make their election as to which they would owe allegiance. They were born within the dominions of the King of England and so were not born aliens, and they have by residing and being registered here, elected to be subjects of the Queen, and not of Hanover. The election once made is final, for allegiance cannot be shifted; and that election is possible is shewn by *In re Bruce* (3), by the ruling of Parke, J., in *Doe* d. *Stansbury* v. *Arkwright* (4), and by the judgment in *Jephson* v. *Riera* (5), for it was there held that an inhabitant of the ceded island of Minorca had by his conduct elected to remain a subject of Great Britain: so that his widow was entitled to dower.

[MATHEW, J., referred to *Inglis* v. *Trustees of the Sailor's Snug Harbour* (6).]

Doe d. *Thomas* v. *Acklam* (7) is the case of children born in America, since the severance of the two countries, of parents born there before, who chose to remain in America when it ceased to be a part of the dominions of the King of England, but the decision in that case depended on the terms of the treaty made between the two countries, and but for that treaty these persons would have continued to be English subjects. *Doe* d. *Auchmuty* v. *Mulcaster* (8), points out that but for the provisions of a treaty a British subject cannot divest himself of his allegiance, and as the

(1) Coke Rep. part vii. p. 1.
(2) 2 How. State Trials, at p. 618.
(3) 2 Cr. & J. 436.
(4) 5 C. & P. 575.
(5) 3 Knapp, P. C. 130.
(6) 3 Peters (U.S.), 99.
(7) 2 B. & C. 779.
(8) 5 B. & C. 771.

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father of the claimants in that case had not done so within the time limited by the treaty it was held that they were not aliens but British subjects within 4 Geo. 2, c. 21, which provides that persons born abroad whose fathers were natural-born subjects are deemed to be natural-born subjects themselves, and this has been extended to grandchildren by 13 Geo. 3, c. 21. 25 Edw. 3, stat. 2, 7 Anne, c. 5, 10 Anne, c. 9 (c. 5, Ruff), were also referred to.

Gully, Q.C., in reply. The argument on behalf of the petitioner rests on the doctrine of election; but none of the cases cited are based on that doctrine. There is, moreover, no evidence that these persons have made any election. Moreover, the persons affected by the severance of America from this country had before that severance but one nationality and one allegiance. *Re Bruce* (1), *Jephson* v. *Riera* (2), and other cases of the same kind all depend on the existence of treaties and on rights expressly created by the terms of the various treaties. If it be suggested that the words of the oath of allegiance throw light on the question, then it is to be observed that at the Revolution the word "heirs" was omitted though it appears again in the oath of allegiance enacted in 31 & 32 Vict. c. 72, s. 2.

Cur. adv. vult.

April 5. The judgment of the Court (Lord Coleridge, C.J., Hawkins, J., and Mathew, J.), was delivered by

LORD COLERIDGE, C.J. In this case a short, but, considering the time, a curious point was raised, whether Hanoverians born before the accession of the Queen (at a time therefore when the Crowns of England and Hanover were held by the same person), resident in this country, not naturalized, but being in all other respects qualified to vote are entitled to vote at the election for members of parliament. Two other points were raised, which it was admitted fell to the ground if the first point was decided adversely to the claim of the first-mentioned voters.

1. Whether persons not naturalized born in Hanover since the accession of the Queen of parents born in Hanover before that date are entitled to vote.

(1) 2 Cr. & J. 436. (2) 3 Knapp, P. C. 130.

2. Whether a person not naturalized born in Prussia since the accession of the Queen, of parents born in Hanover in the reign of George III., is so entitled.

It has been long settled that while the Crowns of two countries are held by the same person, the inhabitants of the two countries are not aliens in the two countries respectively. In both they are the subjects of the same person, are in the allegiance of the same person, and we are not concerned to deny but that they are in the allegiance of the same person in his natural and not in his politic capacity The "damnable and damned opinion" to the contrary for which, according to Lord Coke, the Spencers, father and son, suffered in the reign of Edward II. need not now detain us. For in the case before us the facts are altogether different from those on which the judges decided in *Calvin's Case* (1), and we accept the decision in that case as of the highest and undoubted authority and as binding upon us. In that case the question was whether a man born in Scotland after the accession of James I. to the throne of England was an alien in England, and it was held that he was not. If, therefore, the voters in this case had been born in Hanover after the accession of the Queen to the Crown of the United Kingdom, they would, supposing the Queen to have been also Queen of Hanover, have been in exactly the situation of Calvin, and the decision in his case would have given them their votes.

But they were not in his situation. They were born subjects of a king who was at once King of Hanover and King of Great Britain and Ireland. At the death of William IV. his two Crowns, according to the different laws of succession which obtained in the two countries, went to different successors; to his niece in these islands, to his brother in Hanover.

The Hanoverian by birth who had needed no naturalization in the lifetime of William IV. needed it when the Hanoverian heir and successor of that monarch was no longer the sovereign of these islands. He owed allegiance to William IV. and his heirs and successors according to law, and as a Hanoverian he owed it on the death of William IV. to the Duke of Cumberland, who was, according to Hanoverian law, the heir and successor of his

(1) Coke Rep. part vii. p. 1.

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brother, and ascended the throne as King Ernest in due course of law. He became an alien because the sovereign to whom his allegiance was due was a foreign sovereign; and the person to whom his allegiance had been due was dead leaving an heir. The Crowns had by accident been united in one person, but when the union of the Crowns came to an end the union of allegiance ceased too; and the allegiance which had been due to the King of Hanover, who was also King of the United Kingdom, was never at any time due to the Queen of the United Kingdom, who was not and who could not be by law Queen of Hanover.

Two answers to this plain and simple mode of disposing of the case were suggested by Mr. Charles. First, it was said that in all cases where conflicting duties of allegiance arise the subject has by general law, law which has been adopted into English law, a right of election of which sovereign he will become the subject. To this there are many answers, all conclusive. First, it is a doctrine entirely new; there is no trace of it to be found in terms in any law book or any reported case. The cases to which we were referred in support of it are not authorities at all. Certainly *Doe* d. *Thomas* v. *Acklam* (1) is no such authority. The question was whether the daughter of a man who had been a subject of the King before the treaty between this country and the United States in September, 1783, and who but for that treaty would have remained so, was or was not an alien. The Court held that she was, on the ground that her father before her birth had ceased to be a British subject, and had become an alien by the true effect of the treaty of 1783, whereby, inter alia, the King acknowledges the United States to be free, sovereign and independent states, treats with them as such, and relinquishes all claim to their government.

"Her father," says Lord Tenterden, "by his continued residence in those States" after the treaty "manifestly became a citizen of them." He does not say a word about election, he says in effect that the king having set free the inhabitants of the States from their allegiance, they became aliens. No doubt, if a man had chosen to leave the States newly recognised as independent, and had gone into England or the English dominions

(1) 2 B. & C. 779.

he would have remained what he was before, a British subject and within the allegiance of the British sovereign. But why? Because he never became a citizen of the newly established and recognised States.

Auchmuty v. *Mulcaster* (1) is the converse of this case, and is so treated by Lord Tenterden and his brother judges. R. N. Auchmuty left America when the Treaty of 1783 was signed. He came to England and there resided for some years. Then he returned to America in the service of the British Government, and some years after, when that employment came to an end, he stayed in America, married there, and there he died. The Court there held that, as he had not remained in the newly-made independent country when its independence was conceded, he was still bound by his allegiance to this country; and that his afterwards residing in America could no more get rid of that allegiance, as the law then stood, than residence in any other foreign country. The counsel, it is true, in that case speak of election. The judges give no countenance to the doctrine, but assume and state what was the true doctrine at that time—that allegiance to the Crown of this country cannot be got rid of except by treaty to which the King of his country is a party, and by which he relinquishes his claim to that allegiance. Still less is the case of *Jephson* v. *Riera* (2) any such authority. The case as to the question of Mr. Walls being an alien is decided on the special facts found by the assessor and assumed by the Court to be uncontradicted; that Mr. Walls, who had been a British subject, left Minorca within the time limited by the Treaty of Versailles, and that "he never afterwards returned to Minorca." On this state of facts the judgment proceeds; and it would have been strange indeed if under these circumstances the Court had come to any other conclusion than that from the British allegiance which originally bound Mr. Walls he had never been released. In the case of *In re Bruce* (3) Baron Bayley, in delivering the judgment of the Court (in which Lord Lyndhurst concurred), does use the expressions "option" and "election" as to a person born in Maryland in 1764, and who, in the opinion of the Court, had

(1) 5 B. & C. 771. (2) 3 Knapp, P. C. 130.
(3) 2 Cr. & J. 436.

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taken advantage of the Treaty of 1783 to remain a citizen of the newly constituted United States. They find, in effect, that the King having relinquished his claim to the allegiance of the American citizens, this particular American acquiesced in the relinquishment. The case goes no further, and will not help the petitioner.

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But, secondly, the suggestion of Mr. Charles is contrary to the elementary idea of allegiance itself. Allegiance is a thing to which there are two parties, the sovereign and the subject; it is, as Lord Coke says, "Duplex et reciprocum ligamen;" and again, "Merito igitur ligeantia dicitur a ligando quia continet in se duplex ligamen." And again, "Ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects because they are bound to obey and serve him, and he is called their liege lord because he should maintain and defend them. Therefore it is truly said that 'protectio trahit subjectionem et subjectio protectionem:'" *Calvin's Case.* (1) Blackstone is equally express: "It is a principle of universal law that the natural-born subject of one prince cannot by any act of his own—no, not by swearing allegiance to another—put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that by such voluntary act of his own he should be able at pleasure to unloose those bands by which he is connected to his natural prince:" Blackstone's Commentaries, vol. i., p. 369. And he remarks that down to the time of the Revolution of 1688, for 600 years the oath, whenever administered, was "to be faithful to the king and his heirs." Now, the "natural prince" of a Hanoverian not naturalized in any other country is undoubtedly the King of Hanover or the sovereign who now by conquest represents that King, i.e., the German Emperor. It is not suggested that either

(1) Coke Rep. part vii. at p. 85 a.

the King or the Emperor ever relinquished their claim to the allegiance of these subjects; that allegiance, therefore, remains. Thirdly, the inconveniences that would follow from this claim to elect at the will of the subject were pointed out in the argument, and they are, as far as an argument ab inconvenienti ever can be, practically conclusive. If the Queen of these islands and the German Emperor were to go to war (absit omen, as the judges said in *Calvin's Case* (1), but it has been and may be so again), any one of these resident non-naturalized Hanoverians would undoubtedly, if serving in the British army and taken prisoner, be liable to be shot as a traitor in arms against his sovereign, and the case would be the same with an Englishman (and there must be many such) residing in Hanover, not naturalized and serving in the German armies. The instance of Æneas Macdonald (2) shews—though under a somewhat different head of law—that such a case is by no means merely imaginary. But that a man rightfully and legally in the allegiance of one sovereign could be also rightfully and legally treated as a traitor by another, cannot be the law. Yet it follows inevitably from Mr. Charles's premises, when the essential character of allegiance is understood. Sir William Blackstone, in the passage already cited, gives such a man small consolation. "The natural-born subject of one Prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act which brings him into these straits and difficulties of owing service to two masters." Sir William Blackstone plainly had never heard of the doctrine that a man could get rid, by election, of an allegiance he was born under. And in *Calvin's Case* (1) the difficulty is evaded by saying "that such a man might be ad fidem utriusque Regis," without explaining what was to happen if the faiths conflicted. It was further pointed out that in this case there was no proof of an election in fact, no evidence how long these voters had resided in this country, nothing inconsistent with the supposition that one or all of them might have come into this country quite recently, and even animo revertendi. All that we know is that they were born subjects of the then King of Hanover, who was the sovereign of this country,

(1) Coke Rep. part vii. p. 47, 27 B. (2) 18 How. St. Tr. 858.

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and that they are now resident in this country, the present sovereign of which is not and never was or could be the sovereign of Hanover. The only real authorities which Mr. Charles was able to produce were not the decision but the dicta of the judges in *Calvin's Case.* (1) They are dicta of great weight, as great probably as any dicta can be, for they are the dicta of very great lawyers after very long and exhaustive argument both at the bar and on the bench, Sir F. Bacon arguing as Solicitor-General in support of the view which the judges adopted; and Lord Coke tells us that the Lord Chancellor and twelve of the judges (including himself) concurred in it. Yet with all respect it must be said they are dicta only. They were not necessary for the decision; they were delivered on a matter which Lord Coke calls less than the dream of a shadow or a shadow of a dream, so little was it anticipated that the Crowns of the two kingdoms would ever be severed, and that the question of divided allegiance which would thence arise would ever become a practical one.

The passage is remarkable: "If post nati were by law legitimated in England it was objected that inconvenience and confusion would follow if (for the punishment of us all) the King's royal issue should fail, whereby those kingdoms might again be divided." But as to this, continues the report, "it is less than a dream of a shadow or a shadow of a dream: for it hath been often said natural legitimation respecteth actual obedience to the sovereign at the time of the birth; for as the ante nati remain aliens as to the Crown of England because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent cannot make him a subject to that Crown to which he was alien at the time of his birth: so albeit the kingdoms (which Almighty God of His infinite goodness and mercy divert) should by descent be divided and governed by several kings; yet it was resolved that all those that were born under one natural obedience while the realms were united under one sovereign should remain natural-born subjects and no aliens; for that naturalization due and vested by birthright cannot by any separation of the Crowns afterwards be taken away, nor he that was by judgment of law a natural subject

(1) Coke Rep. part vii. p. 1.

at the time of his birth become an alien by such a matter ex post facto. And in that case, upon such an accident, our post natus may be ad fidem utriusque Regis, as Bracton saith in the afore-remembered place: " Coke Rep. part vii., at p. 46, 27 B.

This, as will be seen, leaves to which kingdom, in case of the supposed severance, the allegiance would be due, wholly uncertain; and it should seem that if there were three or four separate kingdoms there would or might be three or four separate allegiances. The truth is, as we have said, the judges never expected the case to arise, and did not trouble themselves to think out the consequences which would follow from their doctrine if a case they thought so improbable ever did arise. It must be remembered further that *Calvin's Case* (1) was decided in the time of James I., when the feudal system was still in vigour, and when the doctrines which were part of or resulted from it were the law of the land. It was the time of scutages and aids and reliefs and primer seisins and wardships and fines for livery and values and forfeitures of marriages and military tenures in capite. It is not to be wondered at if the language of the judges at such a time as to the character and consequences of personal allegiance, an allegiance which lay at the very root of the feudal system, was widely different from the language of Lord Tenterden and Mr. Justice Erskine, of Lord Lyndhurst and Baron Bayley in the cases on which we have already remarked. This state of things has been changed not only by the 12 Car. 2, c. 24, but by the Act of Settlement in the time of William and Mary, and by the 1 Geo. 1, stat. 2, c. 4, to which so much reference was made in the argument. The case must have arisen when William III. was at once king of this country and stadtholder of Holland. Yet of any claim of Dutchmen resident in this country after the death of King William to be anything but alien here there is no trace to be found in any of the books. And the language of the last-mentioned statutes as well as of 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, as to the children and grandchildren of British subjects is remarkable, for the latter statutes speak of the Crown and not the sovereign, and to our minds clearly recognise that to the King in his politic, and not in his personal capacity, is the allegiance

(1) Coke Rep. part vii. p. 1.

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of his subjects due. For these reasons we think that the votes of the persons born in Hanover before the accession of Her Majesty and not naturalized must be disallowed.

This being our opinion upon the first question submitted to us, it follows that the votes of the persons mentioned in the second and third questions must be disallowed also. Every case which has been cited to us is, as we think, when properly understood, and the facts of it correctly appreciated, an authority for the respondent. The whole argument is with him; the only thing against him is the existence of the dicta to which we have referred. But these dicta appear to us to be plainly open to the remarks we have made upon them; and as none of us have any doubt as to the law, we think there should be no appeal.

Judgment accordingly.

Solicitor for petitioner: *Hughes.*

Solicitors for respondent: *Wilkins, Blyth & Dutton.*

R. B. R.

March 23; *April* 5.

THE WESTERN SUBURBAN AND NOTTING HILL PERMANENT BENEFIT BUILDING SOCIETY *v.* MARTIN.

Building Society—Rules—Dispute—Arbitration—Mortgagor and Mortgagee—Building Societies Act, 1884 (47 & 48 *Vict. c.* 41), *s.* 2.

By s. 2 of the Building Societies Act, 1884, the word "disputes" in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member in his capacity of member of the society, and shall not apply to any dispute between any such society and any member thereof as to the construction or effect of any mortgage deed, and shall not prevent any society, or any member thereof, from obtaining in the ordinary course of law any remedy in respect of any such mortgage to which he or the society would otherwise be by law entitled. The rules of a building society provided that any dispute arising between the society and any member thereof should be referred to arbitration:—

Held, that a dispute between the society and one of its members in their respective capacities of mortgagees and mortgagor, was a dispute between the society and a member in his capacity of member within the meaning of s. 2; that the words "any such mortgage" in the latter part of the section referred only to mortgages in respect of the construction or effect of which there was a dispute, and therefore that the member was entitled to have referred to arbitration a dispute as to whether or not he had paid moneys alleged to be due from him to the society under the mortgage deed.

MOTION on behalf of the plaintiffs, by way of appeal from an order, made by A. L. Smith, J., at chambers, staying proceedings

in an action and referring the matters in dispute therein to arbitration.

The plaintiffs were a benefit building society duly registered under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and the defendant was a member of the society.

The action was brought to recover 34*l.* 12*s.*, the amount of three instalments alleged to be due from the defendant to the plaintiffs under his covenant contained in a mortgage deed dated the 15th of February, 1881.

The plaintiffs were mortgagees, and the defendant mortgagor, under the mortgage deed, which was duly made in accordance with the rules of the society.

It was admitted that the only dispute between the parties to the action was whether or not the plaintiffs had given credit to the defendant for certain payments which he alleged he had made in respect of the principal moneys secured by the mortgage deed.

The defendant took out a summons to stay proceedings in the action, and refer the matter to arbitration under one of the rules of the society, which provided that in case of any dispute arising between the society and any member thereof, or the legal representative of any member, it should be settled by reference to the registrar, or by arbitration as might be agreed upon; but if the disputants should not agree among themselves, then by arbitration. (1)

A master having ordered that the proceedings in the action be stayed, and the matter referred to arbitration, A. L. Smith, J., confirmed his order.

(1) 47 & 48 Vict. c. 41, s. 2: "The word 'disputes' in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member, in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided, and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed or any contract contained in any document other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled."

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Muir Mackenzie, for the plaintiffs.

Tindal Atkinson, for the defendant.

The arguments and authorities cited are sufficiently stated in the judgment of Stephen, J.

Cur. adv. vult.

April 5. GROVE, J. I have adopted to some extent the arguments of the defendant's counsel in arriving at a conclusion in this case. I think that on the true construction of s. 2 of the Building Societies Act, 1884, the legislature has not exempted from arbitration all questions arising on "such" mortgages, but only such questions as relate to the construction and effect of the mortgage deed. I think that the object of the arbitration clauses in the Building Societies Act, 1874, and the earlier Building Societies Acts, was, as stated by Tindal, C.J., in *Crisp* v. *Bunbury* (1), to give a summary and cheap remedy in disputes between building societies and their members. My Brother Stephen will refer to the decisions upon the earlier Acts, but there appears to have been no decision of the Courts under the Act of 1884 on the point before us, though it is said that two judges at chambers, besides Mr. Justice A. L. Smith, from whose decision this appeal is brought, have independently come to the same conclusion as I have. It seems to me that, if s. 2 be construed in the sense for which the plaintiffs' counsel contended, the words "construction or effect of," would be useless in that section. The section, I think, effects a compromise between the views of those members of building societies who desire to have the decision of the highest Courts upon their disputes with the society, and the views of those members who desire to refer their disputes to a more domestic tribunal. The Act, therefore, provided that where the dispute is with respect to the legal construction or effect of a mortgage deed, the case should be exempted from the operation of the arbitration clause, and that other disputes, though they may relate in a sense to the mortgage—as, for instance, questions as to what payment has been made under it—should be referred to arbitration. The word "such" in s. 2 gives rise to a difficulty because it is not grammatically

(1) 8 Bing. 394.

consistent with either construction of the section; but I am of opinion that the best construction is that which applies "such" to mortgages in respect of which disputes as to the construction or effect have arisen. I should go more fully into my reasons for the conclusion at which I have arrived, and consider the decision in *Municipal Permanent Investment Building Society* v. *Kent* (1), but my Brother Stephen has prepared a written judgment which agrees substantially with my view. We are both of opinion that the decision of Smith, J., was right, and that this appeal should be dismissed.

STEPHEN, J., read the following judgment:—This was an appeal from an order made at chambers by A. L. Smith, J., staying proceedings in an action by a building society against one of its members, in order that it might be referred to arbitration under the rules of the society. The question between the parties was as follows:—

The building society issued a writ against the member for the non-payment of instalments, amounting to 34*l.* 12*s.*, due under a mortgage deed, and took out a summons under Order XIV. for judgment. From the affidavits filed on that summons it appeared that the dispute between the parties was whether the defendant had had credit for certain payments which he said he had made.

The defendant maintained that this was a dispute which, under the rules of the society, ought to be referred to arbitration. The plaintiff society maintained that the effect of the statute 47 & 48 Vict. c. 41, s. 2, was to take it out of the rules of the society. Nothing turned upon the language of the rule, and it was agreed that the question depended upon the construction of the statute.

Omitting the words which do not apply to the present case, the enactment runs thus:—[The learned judge read the section as set forth in the head-note to this report.] Two questions were raised upon this enactment. First, was this a dispute between the society and one of its members in his capacity of a member? Secondly, was his mortgage within the words "any such mortgage" in the latter part of the clause?

(1) 9 App. Cas. 260.

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First, as to the meaning of the provision that the word "disputes" is to be held to apply only to disputes between the society and its members in their capacity of members of the society. In order to appreciate the meaning of this expression it is desirable to refer to earlier statues and the cases decided upon them. In 1829 was passed the Friendly Societies Act—10 Geo. 4, c. 56, which enacted by s. 27 that the rules of friendly societies should provide that a reference of every matter in dispute between any such society and any individual member thereof should be made either to justices of the peace, or to arbitrators to be appointed in a certain way. In 1836, by 6 & 7 Wm. 4, c. 32, s. 4 (the first of the Building Societies Acts), this, amongst other provisions of the Friendly Societies Acts, was incorporated, "so far as the same may be applicable to the purpose of any benefit building society." Upon these statutes it was decided in 1849, in the case of *Morrison* v. *Glover* (1), that a dispute between a building society and one of its members on the question whether the member had performed a covenant in his mortgage deed to pay rent to the superior landlord was not such a dispute as must be referred to arbitration, because it was a matter in dispute, not between the society and the defendant as a member of the society, but between them as mortgagor and mortgagee. In 1879 the case of *Mulkern* v. *Lord* (2) was decided upon the same statutes. The building society sought to prevent Lord from carrying on a suit for the redemption of premises mortgaged by him to them for two sums of 12,100*l.* and 4000*l.* The House of Lords held that the statutes 10 Geo. 4, c. 56, and 6 & 7 Wm. 4, c. 32, under which the society was constituted, did not apply to such a transaction. All the Lords who gave judgment in the case laid stress on the inadequacy of the arrangement for arbitration made by the Act of George to deal with the questions which might arise in a suit for redemption of such a nature. It thus appears that the provisions for arbitration in the Acts of George IV. and William IV., as explained by the decisions quoted, did not oust the jurisdiction of the Courts in disputes between building societies and their members in their respective capacities of mortgagor and mortgagee; and each of the cases recognises and

(1) 4 Ex. 430. (2) 4 App. Cas. 182.

proceeds upon a distinction between disputes between building societies and their members in their capacity as members, and disputes between them in their capacities of mortgagor and mortgagee. But it is also to be observed that the societies to which the Act of William IV. applied were regulated by the Act on friendly societies, and that the arrangement made for arbitration by the Act of George IV. was a reference to justices of the peace. These circumstances were relied on by the judges in the different cases as shewing that the legislature did not intend to entrust to them the decision of cases like the one which arose between the parties in *Mulkern* v. *Lord*. (1) In 1874 was passed the Building Societies Act, 1874 (37 & 38 Vict. c. 42), which enacted by s. 16 that the rules of every society established under the Act should set forth "whether disputes between the society and any of its members . . . . should be settled by reference to the Court or to the registrar, or to arbitration." Also s. 34 provides for the appointment of arbitrators, and contains these words: "whatever award shall be made by the arbitrators, or the major part of them . . . . shall determine the dispute."

Upon these enactments it was held, first in *Wright* v. *Monarch Society* (2), and afterwards in *Hack* v. *London Provident Society* (3), that an action by a member against a building society for an account must be referred to arbitration. In March, 1884, the House of Lords decided that an action by a society against a member for instalments must be referred under a rule providing that disputes between the society and its members should be settled by arbitration: *Municipal Society* v. *Kent*. (4) In this case (the facts of which closely resemble those of the present case) Lord Selborne differed from the other members of the House. In a very few words, the difference between his view of the case and that of Lords Blackburn and Watson was that, in his opinion, the Act of 1874 was substantially to the same effect as the Act of 1829, and that the cases decided on the earlier Act, namely, *Morrison* v. *Glover* (5), and *Mulkern* v. *Lord* (1), supplied a rule by which the Act of 1874 ought to be construed. His

(1) 4 App. Cas. 182.
(2) 5 Ch. D. 726 (1877).
(3) 23 Ch. D. 103 (1883).
(4) 9 App. Cas. 260.
(5) 4 Ex. 430.

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judgment is based upon the distinction between disputes between societies and members in their capacity as members, and disputes between the same parties in their capacities of mortgagor and mortgagee.

The judgments of Lord Blackburn and Lord Watson are to the effect that the Act of 1874 was entirely different from the Acts of George III. and William IV., both in its language, its scope, and its general intention. For reasons which they give in great detail, they decide that it was intended to apply to the settlement of disputes about mortgages between the society and its members, and that, as the making of such mortgages is the main object of such societies, disputes between societies and their individual members in relation to mortgages are disputes between the society and its members as such.

Later in the same year (Aug. 7, 1884) the Act on which the present case turns was passed, and the question is whether the matters just stated supply us with any light as to its meaning. The words of the enactment do certainly follow very closely some of the expressions used by Lord Selborne in his judgment, and thus afford plausible ground for the argument that it was intended to give the force of law to his judgment; but when the matter is more closely considered it seems to us that this is not its effect. The authority of Lord Blackburn and Lord Watson, as well as that of the late Master of the Rolls, Sir G. Jessel, may be quoted for the proposition that a dispute between a society and its mortgagor on a mortgage is a dispute between the society and its members as such, and the reason which they give for that opinion appears to us to be valid. It accordingly follows that the restriction of the word "dispute" to disputes between the society and its members in their capacity as such does not prevent the arbitration clause from applying to this case.

It remains to consider the other part of the section. The words to be construed are, "the word 'disputes' shall not apply to any dispute between any such society and any member thereof as to the construction or effect of any mortgage deed, and shall not prevent any society from obtaining in the ordinary course of law any remedy in respect of any such mortgage to which the society would otherwise be by law entitled."

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WESTERN SUBURBAN AND NOTTING HILL PERMANENT BENEFIT BUILDING SOCIETY v. MARTIN.

Stephen, J.

The defendant contended, and A. L. Smith, J., held, that "such" meant any mortgage of which the construction or effect was disputed, which, it was said, was not the case here. The plaintiffs contended that the words "such mortgage" meant any mortgage between a building society and one of its members. The defendant argued that, if the plaintiffs' construction were right, the meaning of the section might have been fully expressed by saying that the word "dispute" should not apply to any dispute between a society and its members as to any mortgage, and this view would render much of the language of the section superfluous, and the word "such" unmeaning. The plaintiffs argued that the defendant's construction introduced into the Act words not found in it, as the section contains no reference to mortgages of which the construction or effect is disputed as a distinct class of mortgages. Neither of these constructions is absolutely inconsistent with the language of the statute, and the arguments by which each is supported are entitled to some weight; but putting upon the earlier part of the section the construction which we have already put upon it, the defendant's construction appears the more natural and probable of the two, as it makes the whole enactment consistent, and suggests that it is the result of a compromise between two extreme views—the view which would exclude from arbitration all disputes about mortgages, and the view which would make all disputes whatever the subject of arbitration even if they related to the construction or effect of a mortgage deed, or written contract other than the rules of the society. The word "such" is certainly not correctly used whatever view may be taken of its meaning, but the meaning thus given to it appears the most likely to be right. We are fortified in this conclusion by the circumstance that two, if not three, learned judges have, as we are informed, taken this view at chambers.

The appeal will therefore be dismissed with costs.

Motion dismissed.

Solicitors for plaintiffs: *Green & Hartcup.*
Solicitor for defendant: *F. P. Sutthery.*

W. A.

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May 6.

EX PARTE HILL. IN RE LANE.

Bill of Sale—Validity—Description of Goods assigned—Omission to specify House or Place where Goods are situated—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 11.

Under the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), a bill of sale is not void for omitting to specify the house or place at which the goods assigned are situated.

APPEAL from the judgment of the judge of the county court holden at Brentford, setting aside a bill of sale, on the ground that the house or place in which the goods were situated was not stated in the bill of sale, or in the schedule, or in the affidavit filed at the time of the registration of the bill of sale.

The bill of sale was an exact copy of the form given in the Bills of Sale (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43). The schedule described the goods, but did not, except as to a few articles, state where they were. The affidavit filed pursuant to 41 & 42 Vict. c. 31, s. 10, described the grantor as being of four different places.

On an application to set aside the bill of sale as being void, because there was, as to the greater part of the goods, no description of the place where they were, the judge granted the application.

The grantee appealed.

H. Kisch, for the appellant. This bill of sale follows exactly the form given in the Act. The Act nowhere requires a statement of the place where the goods are. The specific description required by 45 & 46 Vict. c. 43, s. 4, is not a description of the place where the goods are, what is required is an inventory: *Roberts* v. *Roberts*. (1) The affidavit required by the Act of 1878 (41 & 42 Vict. c. 31), s. 10, contained all the four addresses of the grantor, so that no creditor could be in any way prejudiced. Sect. 11 of the Amendment Act of 1882 (45 & 46 Vict. c. 43) describes the duties of certain officers in circumstances which do

(1) 13 Q. B. D. 794.

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not exist in this case, and the section does not apply, nor can any provision be implied from it requiring a description of the place in which the goods comprised in a bill of sale are situated. [He referred to *Ex parte National Mercantile Bank* (1) and *Jones* v. *Harris*. (2)]

Cooper Wyld, for the trustee. The principles which underlie the Bills of Sale Acts render it imperative that the place in which the goods are should be stated. In this case the grantor is described as of four different places, and persons who may intend to deal with him have a right to know where the goods comprised in this bill of sale are. The Amendment Act of 1882 contemplates that a description of the place will be given, for s. 11 provides that where the bill of sale describes the chattels enumerated therein as being in some place outside the London bankruptcy district the registrar is to send an abstract of the bill of sale to the county court registrar, which is an implied enactment that the place where the goods are must be described in the bill of sale.

MANISTY, J. I am of opinion that this decision must be reversed. The question is whether or not when a bill of sale is made, the place where the goods are which are the subject of the bill of sale, must be stated in the bill of sale. The grantor of the bill of sale describes himself in the affidavit as of four different places, and the schedule describes a number of articles as being in different rooms, though it does not state the house or place in which these rooms are. It then proceeds to specify certain articles as being in two laundries at two of the places named as being residences of or occupied by the grantor, so that, with regard to these articles, there is a statement of the place where they are, and this bill of sale would, at all events, be good as to those articles. I am, however, prepared to go farther, and to hold that this bill of sale is good in toto. The object of the Bills of Sale Acts to which reference has been made was to enable a person who is about to deal with another person to see whether that person has given a bill of sale over his goods. All that is necessary is that a bill of sale shall comply with the

(1) 15 Ch. D. 42. (2) Law Rep. 7 Q. B. 157.

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statute and shall be duly registered in order that an intending creditor may know whether the person to whom he intends to give credit has or has not incurred liabilities. It cannot be said that it is of material importance to the creditor to know in what place the goods are which are comprised in the bill of sale.

CAVE, J. I am of the same opinion. Sect. 9 of the Bills of Sale Amendment Act, 1882, enacts that, "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed," and this bill of sale is an exact copy of the form given in the schedule. That form states that the grantor assigns unto the grantee the things "specifically described in the schedule." Now those words mean described according to their species. It is, however, urged that this bill of sale is void, because it does not state the place at which all the goods comprised in it are, but I cannot adopt that view. The residence and the place of business of the grantor are given in the affidavit, and there is no enactment which says that the bill of sale must state the place at which the goods are. No doubt some description of the place is generally given in order to assist in ascertaining the identity of the goods; but the statute does not require this to be done, and in this case the goods are specifically described in the schedule to the bill of sale. It is further said that s. 11 of the Amendment Act of 1882 shews that a description of the place where the goods are must be given in the bill of sale; but I must protest against such a construction of that section, which only states that where the bill of sale does give a description of the place at which the goods comprised in it are, then in certain cases certain things are to be done. There is nothing in that section which would lead any one to conclude that the place in which the goods are must be described in the bill of sale, and there is nothing in the Act which says that a bill of sale is to be void if there is no such description. It would, I think, be mischievous to impose upon persons who may lend money upon the security of a bill of sale, the duty of spelling over a difficult Act of Parliament in order to see whether some provision could not be implied from a section

in which there is no express enactment to the effect suggested, and when the parties to the bill of sale have done all that the Act requires to be done.

Appeal allowed.

Solicitor for appellant: *Young.*
Solicitor for respondent: *Woodbridge & Sons.*

R. B. R.

LEE AND ANOTHER *v.* BARNES.
BARNES (CLAIMANT.)

April 6.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), *s.* 9—*Recited Indenture—Agreement to perform Covenants of—Non-disclosure thereof.*

A bill of sale after reciting a certain indenture, contained, inter alia, an agreement by the grantor that he would "perform the covenants and stipulations contained in the said recited indenture;" but those covenants and stipulations did not appear in the bill of sale:—

Held, that the bill of sale was therefore void under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9.

APPEAL from the Norwich County Court.

Interpleader issue.

The question was as to the right to goods seized under a fi. fa. and claimed under a bill of sale. By the bill of sale, which was dated the 11th of September, 1885, and made between William Charles Barnes of the one part, and Eleanor Barnes of the other part, after reciting that by an indenture of the 8th of February last, between the same parties, it was part of the consideration therein mentioned that the said William Charles Barnes should forthwith give to the said Eleanor Barnes a bill of sale over all his goods and utensils as a printer for 200*l.*, and interest thereon, as security for the weekly payments in advance to the said Eleanor Barnes of 7*s.* 6*d.* on every Friday during her natural life; and reciting that such bill of sale was duly given dated the 8th of February last, and registered, and that William Charles Barnes made default in the covenants and conditions contained in such bill of sale, which was duly enforced and possession

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taken, and William Charles Barnes had requested Eleanor Barnes to hold over and not to proceed to sale, which she had assented to do upon having the security hereinafter contained, in consideration of such holding over and refraining from sale William Charles Barnes assigned to Eleanor Barnes the chattels described in the schedule by way of security for the 200*l.*, and interest at 15*l.* per cent. per annum: and further agreed that he would punctually pay to her the weekly 7*s.* 6*d.* stipulated by the said thereinbefore recited indenture to be paid by him to her. "And also perform the covenants and stipulations contained in the said recited indenture."

The county court judge decided that the bill of sale was valid.

Horace Browne, for the execution creditors. The bill of sale is void, for it is not in the form prescribed by the Bills of Sale Act (1878) Amendment Act, 1882. The real bargain between the parties cannot be ascertained.

[MATHEW, J. Is it not a mortgage of the goods of the value of 200*l.* to secure payment of an annuity of 7*s.* 6*d.* a week? The transaction seems to be honest and fairly stated.]

It is apparently a loan of 200*l.* at 15*l.* per cent. Moreover, the bill of sale recites a former one, to which it is necessary to refer.

Ogle, for the claimant. The bill of sale is valid.

[MATHEW, J. There is an agreement in it to perform all the covenants and stipulations contained in the within recited indenture, but they do not appear from the bill of sale itself. Must it not shew the terms?]

The within recited indenture may be the former bill of sale of the 8th of February. The instrument in question is a repetition of or in substitution for those recited.

MATHEW, J. This bill of sale must be set aside on the ground that, even giving the most liberal construction to the Bills of Sale Act (1878) Amendment Act, 1882, a bill of sale under it must set out the terms agreed to by the parties. It must be in accordance with the form in the schedule: s. 9. That form directs the insertion of "terms as to insurance, payment of rent,

or otherwise." This bill of sale recites a former bill of sale, and if there were no other objection than that we should have hesitated to set aside the instrument, although not in the form. But the present bill of sale recites also a previous indenture, and then unfortunately contains the terms that the mortgagor will "perform the covenants and stipulations contained in the said recited indenture," and no one looking at the bill of sale would have an opportunity of seeing what those covenants and stipulations were.

A. L. SMITH, J. I would uphold this bill of sale if I could, for it seems to be an honest transaction. But I cannot say that it does not transgress the provisions of the form in the Bills of Sale Act, 1882. Having regard to the enactment in s. 9, that a bill of sale "shall be void unless made in accordance with the form in the schedule to this Act annexed," it is impossible to say this bill of sale is not void on the ground my Brother Mathew has pointed out.

Judgment for the execution creditors.

Solicitors for execution creditors: *Martelli.*
Solicitors for claimant: *Sole, Turner & Co.*

J. R.

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March 11.

GOLDSTROM *v.* TALLERMANN.
(HARRIS, CLAIMANT.)

Bill of Sale—Repayment by Instalments—Interest upon Interest—Postponement of Redemption—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).

By a bill of sale goods were assigned as security for repayment of 500*l.* and interest thereon at 60*l.* per cent., and the grantor agreed to pay "the principal sum aforesaid together with the interest then due by twelve equal monthly payments of 41*l.* 13*s.* 4*d.* until the whole of the said sum and interest should be fully paid," and that in default of payment of any instalment then that the grantor would pay interest thereon at the rate aforesaid from the date when such instalments should become due until full payment thereof. The grantor also agreed, inter alia, to insure the premises assigned and pay all premiums, and that upon default the grantee might do so and "charge the costs thereof with interest at the rate of 20*l.* per cent. per annum" to the grantor, and the same should be considered to be included in the security, and might pay all rent, rates, and taxes at any time due for the messuage in which the goods might be, and thereupon all such payments made by the grantee, together with interest at 20*l.* per cent. per annum, should be a charge on the chattels, which should not be redeemed until full payment of all such sums and interest:—

Held, that on the true construction of the bill of sale, interest upon interest was reserved, and that it was at least uncertain whether redemption was not prevented until the expiration of the period over which the repayment by instalments would extend, and that the stipulations, being doubtful, and of an oppressive kind, were inconsistent with the form prescribed by the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), and rendered the bill of sale void.

INTERPLEADER issue tried before the Deputy Judge of the City of London Court.

The issue was whether certain chattels seized by the sheriff on behalf of the plaintiff under a writ of fi. fa., were at the time of the seizure the property of the claimant as against the plaintiff.

The claimant put in evidence a bill of sale dated the 21st day of July, 1885, and made between the defendant of the one part and the claimant of the other part, whereby in consideration of the sum of 500*l.* then paid by the claimant to the defendant, the defendant assigned to the claimant all the chattels and things specifically described in the schedule to the bill of sale as security for payment of 500*l.* and interest at the rate of 60*l.* per cent. per annum. And the defendant further agreed and declared that he would duly pay to the defendant the principal sum aforesaid,

together with the interest then due, by twelve equal monthly payments of 41*l.* 13*s.* 4*d.* on the 21st day of each and every succeeding month until the whole of the said sum and interest should be fully paid, and that in default of payment of any instalment then that the defendant would pay interest thereon at the rate aforesaid from the date when such instalments should become due until full payment thereof.

By the bill of sale it was further agreed that the defendant should at all times, while any money shall be owing thereon, pay the rent, rates, and taxes of the messuage or premises wherein the chattels thereby assigned should be, and should keep the same from being distrained for rent, rates, or taxes levied on or taken under any execution at law, and would at all times on demand produce to the claimant or his authorized agents the receipt for such rent, rates, and taxes, and also keep the premises thereby assigned insured against loss or damage by fire in some insurance office to be approved of by the claimant, in the name of the claimant, in the sum of 1000*l.*, and would punctually pay all premiums and sums of money necessary for such purpose, and would within seven days after such premium in respect of such insurance should become due, deliver the receipt for the same to the claimant, and that in default thereof it should be lawful for the claimant to keep on foot or effect such insurance, and charge the costs thereof, with interest at the rate of 20*l.* per cent. per annum, to the defendant and the same should be considered to be included in the security, and that it should be lawful for the claimant to pay and discharge all rent, rates, and taxes, assessments and outgoings which at any time during the subsistence of the said security might be due or become assessed or payable in respect of the messuage or premises upon or in which for the time being the said chattels and things might be, and thereupon all such payments made by the claimant, together with interest at the rate of 20*l.* per cent. per annum, should be a charge upon the chattels and things which should not be redeemed until full payment of all such sums and interest. And the defendant covenanted with the claimant that he would on demand pay to him all such premiums and payments made, and all costs, charges, and expenses incurred by him in manner aforesaid with interest

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thereon at the said last-mentioned rate. It was further provided that the said chattels and things thereby assigned should not be liable to seizure or to be taken possession of by the claimant for any cause other than those specified in the 7th section of the Bills of Sale Act (1878) Amendment Act, 1882.

It was admitted that the chattels in the schedule annexed to the bill of sale were those upon which execution was levied.

The deputy judge held that the said bill of sale was void, as it was not made in accordance with the form in the schedule annexed to the said Act, and barred the claim, but gave the claimant leave to appeal.

March 10. *Cooper Willis, Q.C.* (*Ringwood* with him), for the claimant. The bill of sale is valid. The provision for insurance is necessary to maintain the security, and is justified by the form in the Bills of Sale Act, 1882, even if there is some addition to the precise terms of it: *Ex parte Stanford, In re Barber* (1); *Hammond* v. *Hocking*. (2) Although the sums paid for insurance by the grantee are to be "added to the security," they are only a charge on the property and payable as a condition of redemption; but are not included in the provision for payment by monthly instalments, which are fixed at 41*l.* 13*s.* 4*d.* The words "included in the security" do not bring the premiums within the covenant to pay. So long as the instalments of principal and interest are paid there will be no default for which the grantee can seize. The agreement is that until the principal is fully paid the grantor will pay an aliquot part of the principal, and interest on the amount remaining unpaid. Nothing "actually inconsistent" with the form in the schedule of the Bills of Sale Act, 1882, has been added to this bill of sale: see *Davis* v. *Burton*, per Brett, M.R. (3)

Hart, for the execution creditor. The covenant for payment in the form given by the schedule is that the debtor will duly pay the principal sum, "together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]."

(1) 34 W. R. 237. (2) 12 Q. B. D. 291.
(3) 11 Q. B. D. 537, at p. 540.

That part of the form at least must be strictly followed. But in this bill of sale there is an addition, and interest is to be paid on instalments in arrear, and a complicated arithmetical calculation would have to be made to ascertain, after default in payment of two or more instalments, what sum would be payable. The bill of sale covertly provides for payment of interest upon interest, and this effect would be concealed from an ordinary borrower by the phraseology of the instrument. Although the provision that if the borrower does not insure the lender may do so is necessary, the stipulation for 20 per cent. interest on premiums paid is not necessary for the maintenance of the security. Further, the bill of sale is uncertain. The insurances are to be included immediately in the security, but rent, if paid by the lender, is to be only a charge. In *Davis* v. *Burton*, Brett, M.R., said that "the grantee must not attempt to alter the sum secured, and nothing must be added to it except by way of rateable interest (1)." The bill of sale is indistinct and complicated. It has also other defects. The word "fraudulently" is omitted in the covenant not to remove the goods, whereas s. 7 of the Act says that they shall not be liable to seizure unless, inter alia, the grantor shall fraudulently remove them. Again, the stipulation for production of receipts on demand should provide that the demand should be in writing, as in s. 7. [He cited also *Melville* v. *Stringer*. (2)]

Cooper Willis, Q.C., replied.

Cur. adv. vult.

March 11. MATHEW, J. This interpleader was directed in order to determine the validity of a bill of sale on which the claimant relied to defeat an execution, and the bill of sale was alleged to be invalid in consequence of the provisions of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43). Recent cases in which the principle that should guide us are clearly laid down, have been cited and we must construe the Act with the assistance derived from the decisions of our learned Brethren, and of the Court of Appeal. Speaking for myself, I regret that the legislation, the object of which was to protect borrowers—an object far more likely to be attained by making

(1) 11 Q. B. D. 537, at p. 540. (2) 13 Q. B. D. 392.

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them secure, than by making them insecure—has somewhat failed. For the result is that interest increases in proportion to the risk run by the lender. We have, however, to deal with the Act as it is, and it supplies the form which borrowers and lenders have to follow, and contains the stringent provision in s. 9, that "a bill of sale made or given by way of security for the payment of money by the grantor thereof, shall be void unless made in accordance"—which means substantially in accordance—"with the form in the schedule to this Act annexed." In this case it is contended by the execution creditor, that the bill of sale sinned against the Act in various particulars. That it is a money-lender's bill of sale, the interest payable under it being at the rate of 60 per cent., is clearly disclosed on the face of the document, and as far as the borrower is concerned, it cannot be said that he was ignorant of the onerous terms on which he was borrowing. The terms are that the chattels described in the schedule are assigned as security for 500*l.*, and interest thereon at the rate of 60 per cent. per annum, that is, 500*l.* plus 300*l.*, the amount of interest for a year, and the mortgagor agrees and declares "that he will duly pay to the mortgagee the principal sum aforesaid, together with the interest then due, by twelve equal monthly payments of 41*l.* 13*s.* 4*d.*, until the whole of the said sum shall be fully paid." What is the meaning of that stipulation? It is said to follow the form of the Bills of Sale Act, and apparently it does so. There is no question but that 41*l.* 13*s.* 4*d.* represents a monthly instalment of the principal sum. But what is the interest under the provision for monthly payments "until the whole of the said sum and interest shall be fully paid?" Does that mean that there are to be twelve payments of 25*l.* each, or does it mean that the interest is to run on, and to diminish as the principal sum is diminished by payments? I come to the conclusion, not without some hesitation, that the intention was that interest should be paid by twelve monthly instalments, that is, of 25*l.* each, so that would make the amount payable each month 66*l.* 13*s.* 4*d.* These sums are to be paid until the whole of the principal and interest shall be paid.

The argument for the claimant was that the lender would have the right to have his advance outstanding for the whole period over

which the instalments would extend, and might decline to accept redemption until the expiration of that period; and that appears to be the effect of the security, so that a person coming forward to assist the borrower, and to redeem at any time during the twelve months, would find himself met by this stipulation, that the lender was not bound to accept the principal and interest up to that date, but had a right to postpone the redemption. It was said that was not in contravention of the form in the Act, and it certainly does not appear to have been contemplated, and therefore I should hesitate on that ground to declare the bill of sale void. But there is another important provision, that "in default of payment of any instalment, then that he, the mortgagor, will pay interest thereon at the rate aforesaid from the date when such instalment shall become due until full payment thereof." It was pointed out that in this bill of sale, by virtue of that proviso, the grantor would on default of payment of any instalment be bound to pay interest at 60 per cent. also on that instalment, and that appears to me to be the true construction of the bill of sale, at any rate the debtor, or any one coming forward to redeem, would be met by this: viz., that in default of payment of any instalment of 66*l.*, then the mortgagor would pay interest on that instalment, if such is the effect of that stipulation unquestionably it would be a departure from the form of the Bills of Sale Act, which was intended to prevent oppressive stipulations against the borrower. It is perhaps sufficient to say that the bill of sale is in that respect doubtful, for I gather from the cases in the Court of Appeal that it is necessary that the bill of sale should be in such form that "he who runs may read." I doubt, however, that any ordinary man could interpret this bill of sale without legal assistance. But even if an intelligent man had legal advice here there would be interest upon interest secured to the lender. The bill of sale contains the ordinary proviso for payment of rent, and payment of the premiums on an insurance policy. It then provides that in default of payment of the premiums, "it shall be lawful for the mortgagee to keep on foot or effect such insurance, and charge the cost thereof, with interest at the rate of 20*l.* per cent. per annum, to the defendant, and the same shall be considered to be included in the said security." What is the object

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of that proviso? It is said that the intention was to add the costs of any insurance, with 20*l.* per cent. interest on the cost, to the security, and to disable the borrower from repaying the amount of premiums paid by the mortgagee until the redemption of the property assigned by the bill of sale, that is at the end of twelve months, so that the lender might say to the borrower: "I decline to accept repayment of the sum I have paid as premiums of insurance now, they must stand as premiums included in the security, and you must pay interest at 20*l.* per cent. until the property is redeemed." If that be the true interpretation of this clause, it is again a departure from the form in the Bills of Sale Act. Further, this bill of sale goes on, "And also it shall be lawful for the mortgagee (but not imperative upon him) to pay and discharge all rent, rates, and taxes, assessments and outgoings, which at any time during the subsistence of the said security may become assessed or payable in respect of the said messuage or premises upon or in which for the time being the said chattels and things may be, and thereupon all such payments made by the mortgagee, together with interest at the rate of 20*l.* per cent. per annum, shall be a charge upon the said chattels and things, which shall not be redeemed until full payment of all such sums and interest." It is alleged that the borrower has, at the option of the lender, to allow this security to remain outstanding. With respect to that part, as to the other portion, it is sufficient that a fair doubt should be raised on the true construction of the document, and again, on the power of the lender to say there shall be no redemption until the end. It departs widely from the simple form provided by the Act, and is a departure not for the purpose of fairly maintaining the security. It was argued that these are mere clauses introduced to compel the borrower to adhere to the provisions of the bill of sale, and so protect the security. But the true construction is that they are penal clauses involving serious penalties to the borrower on any failure to perform the stipulations, and are in that respect invalid. In my judgment, therefore, this bill of sale is void.

A. L. SMITH, J. Sect. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, has been much discussed, and in the cases

of *Melville* v. *Stringer* (1) and *Davis* v. *Burton* (2) it has been considered by the Court of Appeal. I think the right definition was given by the Master of the Rolls in *Davis* v. *Burton* (3) when he said that the requirement of s. 9 that every bill of sale shall be in accordance with the form in the schedule means, "nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it." The question arises whether anything actually inconsistent with the form in the schedule has been put into this bill of sale? In my judgment there has been. I am not now dealing with the question of rent or insurance, but I am dealing with the part of the bill of sale which prescribes what is to happen on any default being made in payment of any instalment. The mortgagee declares that he will pay the 500*l.* by twelve equal monthly payments of 41*l.* 13*s.* 4*d.* on each day, that is an aliquot part (a twelfth part) of the principal, together with interest then due, "until the whole of the said sum and interest shall be fully paid." Down to that point the bill of sale follows the words of the form in the schedule of the Act, except that the bill of sale contains the additional words "until the whole of the said sum and interest shall be fully paid." If it was meant by this bill of sale to put the mortgagor under the terms that he shall not pay off any part of the money secured except by monthly instalments, I should doubt very much whether that is not an addition to the provisions of the Bills of Sale Act form. I do not, however, found my judgment upon that, for I have not made up my mind on it. But the bill of sale goes on "that in default of payment of any instalment then that he, the mortgagor, will pay interest thereon." What is the meaning of "any instalment?" The true construction is "the principal together with interest then due." Therefore, if the mortgagor does, he will pay interest thereon at the rate of sixty per cent. In my opinion, that stipulation for interest upon interest is an addition inconsistent with the form in the schedule of the Bills of Sale Act. For that form is: "And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by

(1) 13 Q. B. D. 392. (2) 11 Q. B. D. 537.
(3) 11 Q. B. D. at p. 540.

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A. L. Smith, J.

equal payments of £ ." But the stipulation in this bill of sale is, not that the mortgagor will pay the interest then due on the 500*l.* advanced, but that he will pay interest on that interest which is due. I think that there a matter inconsistent with the form prescribed by the schedule has been added, and on that ground the bill of sale cannot be upheld. On the question as to the payment of rent and insurances by the borrower, and that on default, if he does not pay, the lender should do so and charge the borrower 20 per cent. interest, I do not differ from my Brother Mathew, but I do not found my opinion on that, and I am not at present sure that these clauses might not be said to be clauses necessary for the maintenance of the security.

Judgment for execution creditor.

Solicitor for execution creditor: *Joseph Davis.*
Solicitor for claimant: *Edward Lee.*

J. R.

March 2, 15. THE OFFICIAL RECEIVER AS TRUSTEE OF THE ESTATE OF H. G. IZON (A BANKRUPT) *v.* TAILBY.

Bill of Sale—After-acquired Property, Assignment of—Future Book Debts.

A bill of sale contained an assignment of (among other things) all the book debts which might during the continuance of the security become due and owing to the mortgagor:—

Held, that such an assignment of future book debts was valid, and operated to pass the beneficial interest in a debt which came into existence after the assignment.

APPEAL from the judgment of the county court judge of Birmingham.

The facts so far as material were as follows:—

The action was for money had and received. Izon, who was a packing case manufacturer carrying on business at Birmingham, made an arrangement with his creditors for the payment of a composition on his debts by instalments, for the last of which instalments one Tyrrell became surety. Izon gave to Tyrrell a bill of sale to secure payment to him of any sums which he might be called upon to pay as such surety. By the bill of sale Izon,

who was therein described as a packing case manufacturer of 87, Parade, Birmingham, assigned to Tyrrell all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements, and effects now being or which during the continuance of the security might be in, upon or about the premises of the mortgagor, situate at 87, Parade, aforesaid, or any other place or places at which during the continuance of the security the mortgagor might carry on business, and also all the book debts due and owing, or which might during the continuance of the security become due and owing to the said mortgagor.

The bill of sale among other usual clauses gave power to the mortgagee to take possession of and get in the subject-matters of the assignment, if upon a demand in writing served as therein specified the moneys secured by the bill of sale were not paid. (1)

Default being subsequently made in payment of the moneys secured by the bill of sale on demand, the executors of Tyrrell, who had died, proceeded in November, 1884, to give notice of the assignment of the book debts to the various persons who were then debtors to the mortgagor, and to sell and assign the debts so due to the defendant, who in the same month likewise gave notice to such debtors respectively of the assignment to him of the debts. On the 12th of December a petition in bankruptcy was filed against Izon, and on the 9th of January, 1885, he was adjudicated bankrupt. Among the debts sold and assigned to the defendant as aforesaid were certain book debts which had come into existence subsequently to the execution of the bill of sale. The sum which the official receiver sought to recover in the action was the amount of one of such subsequently accruing book debts which had been paid to the defendant by the debtor after the bankruptcy. The county court judge gave judgment

(1) It should perhaps be mentioned that there was in fact a second bill of sale given by the bankrupt to Tyrrell and another person for the purpose of securing further advances made to the bankrupt. The terms of this subsequent bill of sale, which differed in some respects from the former one, became material with regard to certain points raised in the argument which were not considered to call for a report, but, the judgment of the Court not making any distinction between the terms of the two bills of sale, so far as the point here reported is concerned, it has been thought unnecessary to complicate the statement of facts in the report by referring to this second bill of sale.

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for the plaintiff for the amount claimed, on the ground that the assignment of future book debts in the bill of sale was invalid, and did not operate to pass such debts. A rule nisi was obtained to set aside the judgment and enter judgment for the defendant.

March 2. *Muir Mackenzie*, for the plaintiff, shewed cause. An assignment of all future book debts that may become due to the assignor is void as being too wide and uncertain. In the cases in which an assignment of a future debt has been held good, there has always been a reference to some particular fund, or contract, or transaction out of which the debt was to arise, by which the subject-matter of the assignment was ear-marked and ascertained: *Buck* v. *Robson* (1); *Brice* v. *Bannister*. (2) Similarly with regard to an assignment of after-acquired chattels, an assignment of all chattels which might afterwards become the property of the assignor would be too vague: *In re Count d'Epineuil* (3); *Belding* v. *Read*. (4) The assignment must be confined to chattels brought on certain premises or acquired in substitution for existing chattels, or in some such way or other the subject-matter of the assignment must be limited and defined. So a shipowner might effectually assign all freight to be earned in future by some particular ship or ships, but he could not assign all freight which any ship thereafter becoming his property might earn in future. It was pointed out by Lord Westbury in *Holroyd* v. *Marshall* (5) that the principle upon which effect is given to such assignments of future property is that there is a contract to convey the property in question of which equity would compel specific performance. Equity will not enforce specific performance of a contract unless it relates to some particular ascertainable subject-matter. In this case there is nothing to specify from whom the debts are to become due, and from what transactions they are to arise, or any definite time within which they are to arise.

[MATHEW, J. Is not an assignment of all debts becoming due from customers in a particular business as specific as an assignment of all chattels that may be brought on particular premises?

(1) 3 Q. B. D. 686.
(2) 3 Q. B. D. 569.
(3) 20 Ch. D. 758.
(4) 3 H. & C. 955.
(5) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

The assignment is limited to debts becoming due during the continuance of the security.]

In *Clements* v. *Matthews* (1) there was an assignment of future crops, which was good as relating to the future crops on certain specified premises. The majority of the Court of Appeal (Brett, M.R., and Cotton, L.J.), however, intimated an opinion that an assignment of all future crops on any premises of the assignors would be too vague, though Bowen, L.J., took the opposite view. [He also cited *Lazarus* v. *Andrade* (2) and *Leatham* v. *Amor*. (3)]

Adkins, for the defendant, supported the rule. An assignment of all future book debts that may become due during the continuance of the security sufficiently specifies the subject-matter of the assignment. As and when a debt arises and comes into the books, it becomes ascertained as forming the subject-matter of the assignment, and equity will give effect to the contract in relation thereto, just as in the case of an assignment of after-acquired chattels brought upon particular premises, where the subject-matter is ascertained as soon as it comes on to the designated premises. Notice of the assignment having been given to the debtor before the commencement of the bankruptcy, the assignment took effect and operated to pass the beneficial interest in the debt to the defendant. Consequently such debt did not pass to the trustee in bankruptcy. *Clements* v. *Matthews* (1) is really a conclusive authority in favour of the defendant. [He cited *In re Panama, New Zealand, and Australian Royal Mail Co.* (4)]

Cur. adv. vult.

March 15. The judgment of the Court (Hawkins and Mathew, JJ.) was delivered by

MATHEW, J. This action was brought by the official receiver to recover the amount of a debt alleged by him to form part of the bankrupt's estate, but claimed by the defendant as assignee under a bill of sale. It was not contended before us that the bill of sale, so far as it affected the subject-matter of this action, was invalid as being opposed to the policy of the Bankruptcy Act or

(1) 11 Q. B. D. 808.
(2) 5 C. P. D. 318.
(3) 47 L. J. (Q.B.) 581.
(4) Law Rep. 5 Ch. 318.

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by reason of the 13 Eliz., or any other statute. But it was said by the counsel for the official receiver that the bill of sale could not operate on the future book debts on the ground that the subject-matter of the assignment, so far as they were concerned, was not sufficiently defined. Reliance was placed by him on the case of *Belding* v. *Read* (1) and *In re Count d'Epineuil.* (2) It was urged by way of illustration that an assignment of all that a man might earn in future, or of all the goods a man might acquire during the rest of his life, would not be a good assignment, on the ground that it would be too indefinite. That may be so, because it may be said in such a case that there is nothing to show to what particular objects the assignment applies; but it does not appear to me that such cases are analogous to that now before us, because, although a future book debt cannot be said to be defined at the time when the assignment takes place, it sufficiently defines itself as soon as it comes into existence. There is no doubt that there may be a valid assignment of after-acquired chattels. In one sense such an assignment is indefinite, because the future chattel is not specified at the time of the assignment, but, when a chattel comes within the description in the instrument, as for instance, by being brought on a certain farm or place of business, as the case may be, the conveyance applies to it, and it becomes sufficiently defined. That is the effect of the well-known decision in *Holroyd* v. *Marshall.* (3) If future stock-in-trade may be assigned, why may not future book debts? The future stock-in-trade takes the place of and is substituted for the present stock-in-trade. The book debt arises from the disposal of and takes the place of stock-in-trade present or future. When the book debt comes into existence by the disposal of any portion of the stock which as present or future stock was the subject of the assignment, why should not the assignment be valid and take effect so far as such debt is concerned? The case of *Clements* v. *Matthews* (4) was relied upon by the counsel for the defendant, and it appears to us that the decision in that case is a conclusive authority in his favour. The learned judge of the county court considered that he was bound by the decisions in

(1) 3 H. & C. 955.
(2) 20 Ch. D. 758.
(3) 10 H. L. C. 191; 33 L. J. (Ch.) 193.
(4) 11 Q. B. D. 808.

Belding v. *Read* (1) and *In re Count d'Epineuil.* (2) There is considerable difficulty in reconciling those decisions with *Clements* v. *Matthews* (3), and it would seem that their authority is much impaired by that case. But we think that *Clements* v. *Matthews* (3) is binding upon us, and is an authority for the proposition that the book debt in question passed under this bill of sale. We are therefore of opinion that this appeal must be allowed, and judgment entered for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Solicitors to the Board of Trade.*

Solicitors for defendant: *Robinson, Preston, & Stow, for Bagnall.*

E. L.

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Dec. 10.

Practice—Pleading—Seduction—Administering Drugs to procure Abortion—Civil or criminal Proceeding—Application to strike out Paragraph.

In an action for the seduction of the plaintiff's daughter a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion:—

Held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute.

STATEMENT OF CLAIM for seducing the daughter and servant of the plaintiff, whereby she became pregnant.

Paragraph 2. Subsequently to the seduction, the defendant administered to the daughter certain noxious drugs for the purpose of procuring abortion.

The defendant applied at Chambers for an order to strike out the second paragraph, on the ground that it disclosed a felony for which the defendant should have been prosecuted criminally. The master ordered it to be struck out. The plaintiff appealed to Stephen, J., who referred the matter to the Court.

H. Terrell, for the plaintiff. The rule which prevents a party

(1) 3 H. & C. 955. (2) 20 Ch. D. 758.

(3) 11 Q. B. D. 803.

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injured by a felonious act from enforcing a civil remedy against the offender until he has vindicated public justice by the prosecution of the felon, does not apply to a third person who is merely seeking to enforce a remedy for a consequential damage.

[He referred to *Markham* v. *Cobb* (1), *Wells* v. *Abrahams* (2), *Osborn* v. *Gillett* (3), and *Roope* v. *D'Avigdor*. (4)]

L. G. Pike, for the defendant. The second paragraph is vexatious and embarrassing, under Order XIX., r. 27; for the act which it imputes to the defendant is a felony for which no action can be maintained until there has been a criminal prosecution.

HUDDLESTON, B. This action is brought by a mother for the seduction of her daughter whose services she has thereby lost: and the second paragraph of the statement of claim alleges that, subsequently to the seduction, the defendant administered to the daughter certain noxious drugs for the purpose of procuring abortion. It was contended on the part of the defendant, that the master was right in striking out that part of the statement of claim, inasmuch as it shewed, if true, no cause of action which could be maintained until the defendant had been prosecuted for the criminal offence. The objection is one which cannot be taken by plea or by demurrer: *Roope* v. *D'Avigdor* (4); and it seems to be at least doubtful whether or not it is a ground of nonsuit: *Wells* v. *Abrahams*. (2) But it seems to be clear, from what is said in *Markham* v. *Cobb* (1), that it is in the power of the Court to strike out that part of the claim, upon a summary application. The principle upon which this rule is founded seems to be that the interest of the public requires that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy. There is, no doubt, strong authority in support of the rule, but it applies only to the party injured by the felonious act of the defendant. This is clearly pointed out in *Osborn* v. *Gillett*. (3) I think we are bound by the decision in *Osborn* v. *Gillett* (3), and that the master was wrong in striking out the second paragraph of the statement of claim. The appeal will therefore be allowed, with costs.

(1) Sir W. Jones, 147; Noy, Rep. 82.
(2) Law Rep. 7 Q. B. 554.
(3) Law Rep. 8 Ex. 88.
(4) 10 Q. B. D. 412.

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WILLS, J. I am of the same opinion. The authorities which have been referred to leave no room for doubt that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant, until public justice has been vindicated by a prosecution of the criminal. It is equally clear that the objection to the maintenance of the action cannot be raised by plea or by demurrer, or, as it would seem, by way of nonsuit, inasmuch as the cause of action still subsists. But here the action is brought, not by the person upon whom the felonious act was committed, and who owes a duty to the public to prosecute the offender, but by one who has sustained consequential damage, but who is not under any obligation to prosecute. *Osborn* v. *Gillett* (1) is a distinct authority to shew that the present plaintiff is not debarred from maintaining this action. Therefore the master was wrong in striking out the second paragraph of the statement of claim; and this appeal must prevail.

Appeal allowed.

Solicitors for plaintiff: *J. H. Evans.*

Solicitors for defendant: *Lumley & Lumley.*

(1) Law Rep. 8 Ex. 88.

J. S.

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Jan. 25.

THE QUEEN *v.* THE JUDGE OF THE LAMBETH COUNTY COURT.

Parliament—Election—Costs—Charges of Returning Officers—Taxation—Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 *Vict. c.* 84), *s.* 4.

Where the accounts of a returning officer have been taxed by the registrar of a county court under the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), s. 4, the county court judge has no jurisdiction to review the registrar's taxation.

APPLICATION for a rule in the nature of a mandamus calling upon the judge of the Lambeth county court to shew cause why he should not review the taxation by his registrar of the accounts of the returning officer's expenses at the last election for the Dulwich division of the parish of Camberwell, under the 38 & 39 Vict. c. 84, s. 4. (1)

Lyon, in support of the application. The county court judge was of opinion that he had no jurisdiction to review the registrar's taxation, but s. 4 gives him a general jurisdiction over the costs.

DENMAN, J. I am clearly of opinion that we have no jurisdiction to order the judge of the county court to review the taxation. By s. 4 of the Act the court which has jurisdiction to tax the accounts of returning officers is the county court; and by that section the court is expressly impowered to depute any of its powers or duties under the Act to the registrar or other principal officer of the court. The county court judge has deputed to his registrar the duty of dealing with the accounts of the returning

(1) 38 & 39 Vict. c. 84, s. 4, directs the returning officer to transmit an account of his charges to persons specified, and "if the person from whom payment is claimed objects to any part of the claim he may at any time within fourteen days from the time when the account is transmitted to him, apply to the county court for a taxation of the account, and the court shall have jurisdiction to tax the account in such manner and at such time and place as the court thinks fit, and finally to determine the amount payable to the returning officer, and give and enforce judgment for the same.—The court may depute any of its powers or duties under this Act to the registrar or other principal officer of the court."

officer, and the registrar has exercised his discretion and has finally determined the amount payable to the returning officer. Nothing, therefore, remained for the court to do but to give judgment for the amount so ascertained. No words could be plainer than the words used in the Act. This application must be refused.

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MATHEW, J. I am of the same opinion, and for the same reasons. The matter was referred to the proper officer, viz., the registrar of the county court, and we cannot say that he has not exercised his discretion upon it to the best of his ability. I entirely agree with my Brother Denman that we have no power to interfere. What we are in effect called upon to do is to say that the word "finally" is to be struck out of the Act of Parliament.

Rule refused.

Solicitor for applicant: *W. Tyndall Moon.*

J. S.

[IN THE COURT OF APPEAL.]

Feb. 15.

CASEY AND OTHERS *v.* HELLYER AND OTHERS.

Practice—Writ specially indorsed—Action for Recovery of Land—Landlord and Tenant—Rules of Supreme Court, 1883, *Order III., r.* 6 (*F.*)

In an action for the recovery of land by a landlord against a tenant, the writ of summons can be specially indorsed under Order III., r. 6 (F.), only when the plaintiff was party to the lease or agreement under which the hereditaments have been held, or when the defendant has paid rent to the plaintiff, thereby acknowledging his title, or when the defendant is otherwise estopped from denying the plaintiff's title.

APPEAL of the defendants from a decision of Denman and Mathew, JJ., refusing an application for a delivery of a statement of claim.

Action for the recovery of land upon the expiration of a lease. The writ of summons purported to be, under Rules of the Supreme Court, 1883, Order III., r. 6 (F.), indorsed as follows:—

"The claim of the plaintiffs is as follows:—Thomas Henry Casey was receiver appointed to receive the rents and profits of

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the real estate devised by the will of James Richard Aylen, deceased, by an order of the High Court of Justice, dated the 6th of October, 1885. The plaintiffs, except George Ellis and the said Thomas Henry Casey, are devisees under the will of the said James Richard Aylen. The plaintiff George Ellis is the assignee of Charles Thomas Aylen, a devisee under the said will, by an assignment dated the 1st of September, 1885.

"The plaintiffs' claim is for possession of the houses known as 93, 95, 97, Commercial Road, Landport, and for mesne profits from the 29th of June, 1885, until judgment.

"The said premises were demised by the said James Richard Aylen, deceased, to the defendant Henry Hellyer, by lease of August 6, 1860, for term of twenty-five years from June 24, 1860, at a rent of 75*l.* per annum.

"The said tenancy duly expired on the 24th of June, 1885."

The defendants appeared to the writ, and in their appearance gave notice that they required a statement of claim. They afterwards opposed a summons for leave to enter judgment under Order XIV. They then took out a summons calling upon the plaintiffs to shew cause why they should not deliver a statement of claim; that summons was dismissed, and upon appeal to the Queen's Bench Division the decision at chambers was affirmed.

The defendants appealed.

Feb. 6. *Lumley Smith, Q.C.*, and *Bartley Denniss*, (*C. W. Mathews* with them), for the defendants. The plaintiffs are bound to deliver a statement of claim. Order III., r. 6 (F.), of the Rules of the Supreme Court, 1883, was intended to apply only to a simple case between the parties to the demise, where there has been no devolution of the plaintiff's title.

Crump, Q.C., for the plaintiffs.

LORD ESHER, M.R. We think that a statement of claim ought to be delivered. We will give our view as to the construction of the rule on a subsequent day.

LINDLEY and LOPES, L.JJ., concurred.

Cur. adv. vult.

Feb. 15. The following judgments were delivered:— 1886

Casey v. Hellyer.

Lord Esher, M.R. At the time when this case was argued, we settled what ought to be done as to the delivery of a statement of claim; but we wanted to speak to the other members of the Court of Appeal upon the point, what is the true construction of Rules of the Supreme Court, 1883, Order III., r. 6 (F.). The writ of summons purported to be specially indorsed under that rule, the action being for the recovery of land, and the plaintiffs alleging that the relation of landlords and tenants existed; and they claimed summary judgment under Order XIV. The defendants objected that the writ was not specially indorsed under Order III., r. 6, and therefore that Order XIV. did not apply, and they contended that they were entitled to the delivery of a statement of claim under Order XX., r. 1 (b). The question, therefore, really seems to be what is the true meaning of Order III., r. 6 (F.). The case was argued a few days ago, and we are of opinion, upon looking at the context in the rule, and also at the form given in Appendix C. sect. VII., No. 1, that it was intended to include only the most simple cases between landlord and tenant where it is unnecessary to prove any devolution of title, at least on the part of the plaintiff, as, for instance, where the plaintiff claims to enter under the terms of a lease or agreement granted by himself, or where the defendant has attorned to the plaintiff by payment of rent, or is otherwise estopped from denying the plaintiff's title. All the members of this Court are of opinion that the rule applies only to those very simple instances.

Lindley, L.J. It is important to ascertain the true construction of the rule. In the present case it appears from the indorsement upon the writ of summons, that J. R. Aylen demised the houses sought to be recovered in this action for the term of twenty-five years, which expired on the 24th of June, 1885. The lessee was the defendant Hellyer. The plaintiffs, except G. Ellis and T. H. Casey, are devisees under the will of J. R. Aylen, and G. Ellis is the assignee of another devisee, and T. H. Casey is a receiver appointed by an order of the High Court. Can it have been intended that where plaintiffs claim under a title so complicated, they should be allowed to specially indorse the writ of

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summons under Order III., r. 6 (F.)? That rule refers to actions "by a landlord against a tenant . . . . or against persons claiming under such tenant;" it does not allude to actions where the plaintiff is the assignee or devisee of the original lessor. It appears to me that the rule applies only to those cases where the plaintiff has himself demised the property and has been party to the lease or agreement under which it has been held, or where there has been a payment of rent by the defendant to the plaintiff in the action, or where the defendant is otherwise estopped from denying the plaintiff's title.

LOPES, L.J. This is not a simple case of landlord and tenant; but it is a case where there has been a devolution of title, and where the plaintiffs will have to prove that they are entitled to represent the grantor of the lease. Formerly it was not possible for a landlord to sue his tenant upon a specially indorsed writ in an action for the recovery of land; but this power has been conferred by the Rules of the Supreme Court, 1883. I think, however, that a landlord can only avail himself of Order III., r. 6, when he himself is party to the contract under which the tenant holds, whether that contract is or is not in writing, and if it is in writing, whether that contract is or is not under seal, or where there has been a payment of rent by the defendant, or where he is otherwise estopped from denying the plaintiff's title. The operation of the rule is confined to those cases which I have mentioned. The rule mentions "persons claiming under such tenant," but it does not refer to persons claiming under the landlord. This is a significant circumstance. The form given in App. C., sect. VII. No. 1, supports the view which I have taken. In my opinion the appeal ought to be allowed, for in a case like this the writ of summons cannot be specially indorsed.

Appeal allowed.

Solicitor for plaintiffs: *A. W. Mills, for T. A. Bramsdon, Portsmouth.*

Solicitors for defendants: *Chamberlayne & Beaumont, for Hyde, Portsmouth.*

J. E. H.

[IN THE COURT OF APPEAL.]

1886
March 4.

NICHOLL AND OTHERS *v.* WHEELER AND ANOTHER.

Practice—Discovery of Documents—Interrogatory—Sufficient Affidavit of Documents.

In an action for the recovery of land the defendant claimed that certain documents mentioned in his affidavit of documents were privileged from production, on the ground that they supported his title and did not contain anything impeaching his defence or supporting the plaintiffs' case. The defendant's affidavit was sufficient on the face of it. The plaintiffs proposed to administer interrogatories to the defendant for the purpose of shewing that the documents in question supported the plaintiffs' title, and therefore that they were not privileged from production:—

Held, that the interrogatories were inadmissible.

Jones v. *Monte Video Gas Co.* (5 Q. B. D. 556), and *Hall* v. *Truman, Hanbury & Co.* (29 Ch. D. 307) followed.

APPEAL from a decision of the Queen's Bench Division (Mathew and A. L. Smith, JJ.), refusing to order the defendant, William Boddington, to file a further and better affidavit in answer to the plaintiffs' interrogatories.

The action was brought to recover possession of certain hereditaments on the expiration of a long lease granted in 1636. The defendant, Boddington, appeared as landlord, and relied upon the possession of his tenant. In the course of the proceedings in the action he was required to make an affidavit of documents, and in the second part of the schedule to his affidavit he set out certain documents, being copies of the will and codicil of John Bennett, probate of the will of John Bennett, certain indentures of various dates, and an agreement. As to these documents he ultimately claimed that they were privileged from production on the ground that they formed or supported his title to the premises in dispute, and might be used by him in evidence accordingly, and that they did not contain anything impeaching the defence, or forming or supporting the plaintiffs' title or the plaintiffs' case. The plaintiffs, however, alleged that they had seen copies of documents of the same dates, which they believed to be copies of the documents specified in the affidavit, and administered interrogatories with the view of shewing that the

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documents related to the property described in the lease of 1636, and that they were mortgages which would enable the plaintiffs to shew that the defendant derived title through the mortgagor, who had paid rent to the plaintiffs' predecessors in title. The defendant answered the fourth of the interrogatories, and as to the others he objected to answer any of them on the ground that they inquired as to the contents of written documents, and that he had already made affidavits of documents in the action, and that the documents with respect to which inquiries were made in the interrogatories formed or supported his title to the premises in dispute, and might be used by him in evidence accordingly, and that they did not contain anything impeaching his defence, or forming or supporting the plaintiffs' title or the plaintiffs' case. (1)

(1) The nature of the interrogatories proposed by the plaintiffs to be administered to the defendant, may be gathered from the first three of them:—

"1. Is it not the fact that the document referred to in the 2nd part of the schedule to your affidavit in this action . . . . described as probate of the will of John Bennett, and dated the 18th day of November, 1806, contains a devise from the said John Bennett to his brother or to some other and what person of the land in question in this action, known as and in the said will described as 'Stonepit,' and that in the said devise the said land is described as the testator's 'leasehold close or enclosed ground?'

"2. Is it not the case that the indenture referred to in the said schedule as an indenture dated the 20th of March, 1743, is a mortgage of certain property by John Bennett to William Bennett, or, by and to some other and what person or persons by way of demise for a term of years? If the indenture was not such a mortgage, describe generally what is the nature of it. Were and are not parts of the premises described in the said deed, described in the same words as some of the property demised by the lease of the 20th of December, 1636, referred to in the indorsement on the writ in this action, namely, as 'All that parcel or piece of ground situate, lying, and being in Chacombe, containing 10A. 3R. 5P., being part and parcel of 17A. 2R. 0P., lying and being in Chacombe aforesaid, in a certain place commonly called King's Yard and Christmas Tide adjoining to the plot formerly laid out for Richard Watts, alias Warner, South, and the plot formerly laid out for Richard Key, North, to the Middleton Highway, West, and the plot formerly laid out for Gabriel Sabin, East, and which said plot was then in the occupation of said John Bennett,' or in some other, and what practically identical language? Are not the said premises now in the possession of the defendant?

"3. Is it not the fact that the indenture referred to in the said schedule, as an indenture dated the 19th of March, 1819, was a mortgage by way of demise for a term of years from William Bennett to Jane Hayward, or

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A summons to compel the defendant to file a further and better affidavit in answer to the plaintiffs' interrogatories, was referred by Field, J., to the Queen's Bench Division.

Feb. 11. *W. Graham*, for the plaintiffs, referred to *Attorney-General* v. *Emerson* (1); *Jones* v. *Monte Video Gas Co.* (2); *Mansell* v. *Feeney* (3); *Dalrymple* v. *Leslie* (4); *Brown* v. *Wales.* (5)

[SMITH, J., referred to *Taylor* v. *Batten.* (6)]

R. G. Glenn, for the defendant, was not called on.

MATHEW, J. I am of opinion that we ought to refuse this application. In form it is indefensible, but we are asked to look at the substance and determine the question on the principle laid down in the cases, which have been decided on the point as to how far a positive affidavit of documents can be displaced. Here the affidavit of documents is a proper affidavit, but it is contended that the plaintiffs are entitled by means of interrogatories to satisfy us that the affidavit is incorrect. The plaintiffs seek to administer interrogatories for the purpose of proving that the affidavit is untrue, and these interrogatories amount to cross-examination for the purpose of displacing the privilege claimed, and of obtaining admissions. The rule is that an affidavit of documents is not to be disregarded, unless the Court has reasonable grounds for distrusting the statements contained in it. Here the plaintiffs try to furnish such grounds by means of interrogatories, but in my opinion they are not entitled to cross-examine the defendant in order to shew that the documents, for which privilege is claimed in the affidavit, are not entitled to that privilege.

A. L. SMITH, J. I am of the same opinion. The question really is whether these are legitimate interrogatories. Mr. Graham says that there is no direct authority against allowing them, but

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if not, from whom to whom, and that parts of the premises described in the said indenture are described in the same manner or some other and what practically identical language?"

(1) 10 Q. B. D. 191.

(2) 5 Q. B. D. 556.

(3) 2 J. & H. 320.

(4) 8 Q. B. D. 5.

(5) Law Rep. 15 Eq. 142.

(6) 4 Q. B. D. 85.

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I never saw such interrogatories as these allowed. Where it is stated in an affidavit of documents that certain specified documents are privileged from production, there is no objection to the affidavit; but the plaintiffs here contend that they are entitled to cross-examine the defendant for the purpose of shewing that the privilege is not rightly claimed. I am prepared to hold that it is not a legitimate course of proceeding to cross-examine by means of interrogatories a party, who has made an affidavit of documents, in order to shew that the privilege claimed does not exist. It is illegitimate both because the interrogatories amount to cross-examination, and because they inquire as to the contents of documents, for these interrogatories do not merely identify the documents to which they refer. The defendant is entitled to object on the ground that he cannot be cross-examined by interrogatories, and that, if he could, the form of these interrogatories is indefensible. On both of these grounds I am of opinion that this application ought to be refused.

Application refused.

The plaintiffs appealed.

W. Graham, for the plaintiffs. The defendant's affidavit of documents may be on the face of it in due form; but the plaintiffs are not so tied by the words of it, that they are forbidden to administer interrogatories for the purpose of shewing, that the documents in respect of which privilege is claimed really support their case: *Jones* v. *Monte Video Gas Co.* (1); and if it can be shewn by the interrogatories that the affidavit of documents is inaccurate, the defendant will be compelled to give to the plaintiffs the information which they require: *Attorney General* v. *Emerson.* (2) It is manifest that the proper course of proceeding if a party to an action is dissatisfied with his opponent's affidavit of documents, is by administering interrogatories: *Newall* v. *Telegraph Construction Co.* (3); *Catt* v. *Tourle* (4); *Thorp* v. *Sutcliffe.* (5) A plaintiff is entitled to discovery from the defendant not only of that which constitutes his (the plaintiff's) title, but

(1) 5 Q. B. D. 556.
(2) 10 Q. B. D. 191.
(3) Law Rep. 2 Eq. 756.
(4) 18 W. R. 966.
(5) 39 L. J. (Ch.) 712.

also for the purpose of repelling what he anticipates will be the case set up by the defendant: *Attorney General* v. *Corporation of London.* (1)

H. Hurrell, for the defendant, was not called upon to argue.

LINDLEY, L.J. I think that the decision of the Queen's Bench Division was right. This appeal is really an attempt to cross-examine a party to a suit upon an affidavit of documents by means of interrogatories. The only ground for the attempt is, that the plaintiffs think it desirable in their own interest to obtain further information from the defendant. But that is not sufficient, although in some cases it may be allowable to interrogate a party to an action, if his affidavit of documents is not sufficient; those cases are pointed out in *Jones* v. *Monte Video Gas Co.* (2) and *Hall* v. *Truman, Hanbury, & Co.* (3) In the latter case Cotton, L.J., said (4): "It is difficult, no doubt, to say what circumstances would justify the putting of an interrogatory as to documents to a party, who has already made a sufficient affidavit of documents. But, if the Court is satisfied that, notwithstanding the affidavit, there is or may be some specified relevant document or documents in the possession of the party whom it is desired to interrogate, it may possibly be right to allow an interrogatory to be put whether that particular document, or those particular documents, is or are in his possession. But a primâ facie case must be shewn before such an interrogatory can be permitted, and it should be made the subject of a special application." And Fry, L.J., also said (5): "Still, no doubt, the practice was in some cases to allow an interrogatory as to specified documents to be administered, and it is this practice which was referred to in *Jones* v. *Monte Video Gas Co.* (2) I will not define in what cases this may be done; but, in my opinion, it is the duty of the Court to watch with care and some jealousy any attempt to establish two methods of obtaining the discovery of documents." I agree with that statement of the law. If there were in this case any ground for disbelieving the affidavit of

(1) 2 M. & G. 247.
(2) 5 Q. B. D. 556.
(3) 29 Ch. D. 307.
(4) At p. 320.
(5) At p. 321.

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documents, or believing that the documents related to the plaintiffs' title as was suggested on their behalf, I will not go so far as to say that no interrogatory would be allowed. The only ground here, upon which the Court is asked to sanction by means of interrogatories a cross-examination of the defendant as to the documents in his possession, is the suggestion on behalf of the plaintiffs, that the answer would shew that the documents are material to their case. I do not think it desirable to allow the defendant to be cross-examined. This appeal, therefore, must be dismissed.

LOPES, L.J. I also think that this appeal must be dismissed. An affidavit of documents, which is sufficient on the face of it, is conclusive, unless some reasonable ground is shewn for believing that the affidavit cannot be trusted. I take it that the authorities shew that where the affidavit of documents is sufficient, no further discovery by means of interrogatories is proper, unless a primâ facie case is made out for them. I adopt that portion of the judgment of Cotton, L.J., in *Hall* v. *Truman, Hanbury, & Co.* (1), which has been referred to by Lindley, L.J. I think that no primâ facie case has been made out for administering interrogatories in this case.

Appeal dismissed.

Solicitors for plaintiffs: *Nicholl, Manisty, & Co.*

Solicitor for defendant: *A. Hughes, for Fortescue & Sons, Banbury.*

(1) 29 Ch. D. 307.

J. E. H.

ECCLES *v.* THE WIRRAL RURAL SANITARY AUTHORITY. 1886 *March* 13.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Sewering and paving "Street"—Apportionment of Expenses—Summary Proceedings against Frontager—Right to dispute Liability before Justices.*

In proceedings before justices under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, to recover from an owner of premises fronting a road his proportion of expenses incurred by the local authority in sewering, levelling, and paving it, the owner may dispute his liability by shewing that the road is not a "street," or that it is a "highway repairable by the inhabitants at large."

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions for Wirral, Chester, a complaint was preferred by the clerk to the rural sanitary authority for Wirral, against the appellant under s. 150 of the Act 38 & 39 Vict. c. 55 (Public Health Act, 1875), charging that the respondents within their district, in accordance with the Public Health Act, 1875, executed certain works upon a street called Lake Place, of which the appellant was part owner, and that the expenses incurred by the respondents according to the frontage of the appellant's premises amounted to 65*l.* 16*s.* 10*d.*, as settled by the surveyor to the respondents; that the amount was to be paid by nine annual instalments of 7*l.* 6*s.* 4*d.*; and that an instalment of 7*l.* 6*s.* 4*d.* had not been paid by the appellant.

The justices made an order for the payment of the instalment due from the appellant, with costs.

Upon the hearing it was admitted by the appellant that he was the owner of premises fronting, adjoining, or abutting upon Lake Place, and that the provisions of s. 150 of the Public Health Act as regards the service of the requisite notices had been complied with, and that payment of the instalment of 7*l.* 6*s.* 4*d.* had been duly demanded; but it was stated that the appellant intended to call evidence to resist the claim on the ground that Lake Place was not a street, and that should the justices decide it to be so, it was a highway repairable by the inhabitants at large, and not by the frontagers.

The respondents contended that the appellant's only remedy was to appeal to the Local Government Board under s. 268 of the

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Public Health Act, which provides, "That any person who deems himself aggrieved by the decision of the local authority in any case in which they are empowered to recover in a summary manner any expenses incurred by them, may within twenty-one days address a memorial to the Local Government Board;" that it was not for the justices to receive evidence and determine whether or not Lake Place was a street or a highway repairable by the inhabitants at large, but that on an order being applied for to enforce payment of the expenses incurred it was, subject to the prescribed legal requirements having been satisfied, their duty to grant that order.

The appellant contended that the justices ought to inquire into the original liability of the appellant and decide whether Lake Place was or was not a street, and if so, whether it was a highway repairable by the inhabitants at large or not.

The justices were of opinion that the respondents having complied with all the formalities of the Public Health Act and incurred the expenses named in making the street called Lake Place, the duty of the justices was purely ministerial, and therefore made the order on the appellant.

The questions for the opinion of the Court were whether the justices had power to receive evidence, and on hearing the same to decide that Lake Place was or was not a street, and if so, that it was or was not a highway repairable by the inhabitants at large.

March 12. *Joseph Walton*, for the appellant. If the road was not a street, or was a highway repairable by the inhabitants at large, the frontager is not liable under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257, and notwithstanding the apportionment may dispute his liability before the justices: *Hesketh* v. *Atherton Local Board*. (1) Unless some distinction can be shewn between the earlier Public Health Acts on which that case was decided, it is directly in point. In *Bournemouth Commissioners* v. *Watts* (2), and *Lewis* v. *Cardiff Urban Sanitary Authority* (3), there are dicta supporting the present contention, and tending to shew

(1) Law Rep. 9 Q. B. 4. (2) 14 Q. B. D. 87.
(3) 47 L. J. (M.C.) 101.

that the law is unaltered by the Public Health Act, 1875. In *Wake* v. *Mayor, &c. of Sheffield* (1), part of the expenditure was undoubtedly on a street, and therefore the magistrate had jurisdiction. But Brett, M.R., said: "It may be that the magistrate has power to inquire whether the case is within the Act at all; and if so, and he finds that it is not within the Act, it may be that he has no jurisdiction to make any further order."

Pickford, and *Newson*, for the respondents. In *Ex parte Wake* (2), the recorder had found as facts that neither of the pieces of the land formed part of the street at the date of the notice, but was of opinion that the objection was not one which could be entertained by justices upon an application to order payment of the sum apportioned, and that the remedy of the appellant was to appeal to the Local Government Board under s. 268. The point was argued in the High Court, and Cave, J., expressed his opinion that the conclusion of the recorder was right, and pointed out that in *Hesketh* v. *Atherton Local Board* (3) the attention of the Court did not seem to have been called to the existence of any provision in the Public Health Acts corresponding to s. 268 of the Act of 1875. Smith, J., offered no opinion upon the point decided by the recorder, and in the Court of Appeal (4) the case was certainly not treated as governed by *Hesketh* v. *Atherton Local Board* (3), but the Court held that the only remedy for the appellant was to appeal under s. 268 to the Local Government Board. The difference between the Public Health Act of 1848 and the Act of 1875 is, that under the former Act the decision of the Local Government Board only bound the local authority, whereas now it binds both parties. The Local Government Board can do more than a Court of law, for they may inquire into every fact which can reasonably lead them to a fair and equitable conclusion, as Brett, L.J., said in *Reg.* v. *Local Government Board*. (5) Further, an adjudication by the magistrates that the street was a highway repairable by the inhabitants at large, is beyond their jurisdiction, and therefore does not

(1) 12 Q. B. D. 142.
(2) 11 Q. B. D. 291.
(3) Law Rep. 9 Q. B. 4.
(4) 12 Q. B. D. 142.
(5) 10 Q. B. D. 309, at p. 326.

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operate as an estoppel: *Reg.* v. *Hutchings.* (1) In *Cook* v. *Ipswich Local Board* (2), Cockburn, C.J., said that the justices, in the exercise of their summary jurisdiction, could not go into any question except that of whether the proportion assessed upon the particular individual was the right proportion or not. The only case in which the present point has directly arisen is *Ex parte Wake.* (3)

[SMITH, J. When I said in that case that I offered no opinion upon the point decided by the recorder, I meant on his finding on the facts.]

Walton, replied.

Cur. adv. vult.

March 13. MATHEW, J. The sections of the Public Health Act, 1875, which are material are ss. 150, 257, 261, and 268. It was argued for the appellant that a person charged under the Act, a person against whom an apportionment had been made, and called on to pay, might object in one of two ways. First, by demanding arbitration, which must be within three months. Second, by appeal to the Local Government Board, which appeal must be within twenty-one days after notice of the decision of the local authority.

It was not contended that if either of those two courses had been taken, the result might not be conclusive, and we express no opinion upon that question as it is unnecessary to do so. The appellant said that a third course might be followed: that the party might wait until summary proceedings were taken before justices, and then if his objection was that he was not liable under the Act, and they had not jurisdiction to make the order on him for the reasons given in the case, he would be at liberty to go into that question, and if he succeeded in establishing that objection, he would be exempt.

From the language of the Act, one would certainly come to the conclusion that it was the intention that the Court should determine the question of liability under such circumstances, and by s. 261 jurisdiction is conferred on the county court in cases of

(1) 6 Q. B. D. 300. (2) Law Rep. 6 Q. B. 451, at p. 463.
(3) 11 Q. B. D. 291.

this kind, where the amount is below 50*l.*, and although I cannot find any provision which in terms gives the superior Court jurisdiction, I should infer that where the amount is above 50*l.*, an action would lie in the superior Court. But why should such a provision be made, if it were intended that after the expiration of three months without objection the party should be inevitably liable? If all that could be done was to go before the justices, and the person was estopped from saying he was not liable, why should an action when the amount was under or over 50*l.* be contemplated or necessary? The appellant relied on the case of *Hesketh* v. *Atherton* (1), which was on s. 69 of the Public Health Act, 1848, practically identical with the section of this Act, and in which the Court of Queen's Bench Division decided that it was the duty of the justices to enter into the question of liability, and also on *Midland Ry. Co.* v. *Watton* (2), in which Cave, J. had decided that it was the duty of the magistrate to state a case setting out the facts on which he had come to the conclusion that a certain road was a street within s. 150 of the Public Health Act, 1875. On the other hand it was argued for the respondent, that the position of the party charged in this case was similar to that of a person rated to a poor-rate who had not appealed against the rate, and therefore was primâ facie bound to pay, and it was said that the duty of the justices was wholly ministerial, and it was not competent for them to go into the question, and reliance was placed on *Ex parte Wake* (3), and the judgment of my Brother Cave, which certainly at first glance seems as if he had pronounced—not a decision, but—a strong opinion that the only mode of objecting was by appeal to the Local Government Board. But when the case is examined, we see that he did not mean to lay down any such general proposition. He was dealing with a case where the whole question was the amount of liability. It was admitted that the defendant was liable for a part of the expenses; but it was contended that a portion of the expenses had been incurred on a part of the roadway, which was not part of the street, and Cave, J., thought that was a question partly of liability

(1) Law Rep. 9 Q. B. 4. (2) Ante, p. 30.
(3) 11 Q. B. D. 291.

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and partly of amount of liability, and the proper remedy of the party was to proceed under the sections giving him either a right to arbitration or of appeal to the Local Government Board; and that that was the view of my Brother Cave is made still more clear by the language of the Master of the Rolls in dealing with the case in the Court of Appeal. It will be found that the Master of the Rolls carefully abstained from expressing an opinion that where the only question is one of liability, the party is not entitled to object before the justices. So that case is no authority on this case, and the principle laid down in *Ex parte Wake* (1), was adopted in *Midland Ry. Co.* v. *Watton* (2), in which we held that the question of liability, viz., whether the road was a street within the Act, was a question which might be raised before the justices. Therefore, the conclusion which I have come to on the case clearly is that it is open to the person charged to reserve his defence until proceedings are taken against him, and he may raise his defence either if an action is brought, or if summary proceedings are taken before magistrates, as was sought to be done in this case. As to the observations of Lord Esher in the *Penarth Case* (3), I should have thought that there was much weight in the argument that the Local Government Board could not be treated as a Court having exclusive jurisdiction in a case of this kind. It may be that if a party chooses to resort to that tribunal, he should be bound by what it does. But that it should otherwise be conclusive, is opposed to all principle. It is not a Court. No procedure is pointed out, and the idea is that the Board are to pronounce what judgment they choose though opposed to law and principles of equity, so long as they think it equity. That question is well deserving of very careful consideration, and far more elaborate argument than it was necessary to address to us in this case. It is only because the Master of the Rolls seems to suggest it might be that the appellant should go to the Local Government Board, that I do not pronounce a definite opinion upon it in this case. I see no reason in the case of *Hesketh* v. *Atherton* (4) to doubt that this objection might have been enter-

(1) 11 Q. B. D. 291.
(2) Ante, p. 30.
(3) 10 Q. B. D. 309.
(4) Law Rep. 9 Q. B. 4.

tained by the magistrates. Their decision must be set aside, and the case must go back to them to review their determination.

A. L. SMITH, J. This is not like the case of a rate laid by the justices having only the ministerial duty of enforcing it, by signing a distress warrant. I think ss. 150, 257 and 269, taken together form a code by which the frontager is summoned, and is to be heard, and if dissatisfied with the order of the justices he may go to quarter sessions by way of appeal. The question arises, is he entitled to say that he is not liable to pay anything? It is truly said that if the apportionment was made, and he did not think fit to demand arbitration or appeal to the Local Government Board, and the locus is a "street" within s. 150, he is precluded, and cannot dispute the apportionment before justices, because by s. 257, "When such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months . . ." he shall by written notice dispute the same. It only makes the apportionment binding. But the appellant says, "I do not dispute the apportionment, but contend that you the local authority had no right to execute this work, and call on me to contribute." The question is whether he can take this point before the justices. I think that he can. It seems to me that on the true construction of the statute, it is competent to the frontager, when summoned, to say "You have no right to execute this work and call on me to reimburse you, because I am not a frontager, or it was not a 'street,' or it was 'repairable by the inhabitants at large.'" But it is said that he ought to have appealed to the Local Government Board. I am not going to decide whether he could or could not have done so. That may be a matter well open to argument, and I do not think it is concluded by the judgment of Lord Esher in the *Penarth Case* (1); nor do I decide whether the appellant might have gone to arbitration. I am of opinion that on the construction of s. 150 he had a right to object before the justices that he was not liable. The expenses recoverable must be "expenses for the repayment whereof the owner of the premises

(1) 10 Q. B. D. 309.

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is made liable under this Act," s. 257. Surely it is for the local authority to make out that they are expenses for which he was liable under this Act. I think the justices were wrong, and this case must go back to them to entertain the question.

Appeal allowed.

Solicitors for appellant: *Clare & McMaster.*
Solicitor for respondents: *Thompson.*

J. R.

March 22.

IN RE AN ARBITRATION BETWEEN MACKENZIE AND THE ASCOT GAS COMPANY.

Local Government Acts—Arbitration—Public Health Act, 1875 (38 & 39 *Vict. c.* 55)—*Power to enlarge Time for making Award—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 15.

The Court cannot enlarge the time for making an award under the Public Health Act, 1875 (38 & 39 Vict. c. 55), beyond the period limited in s. 180.

MOTION to enlarge the time for making an award.

The Ascot District Gas Act, 1882 (45 & 46 Vict. c. clii., s. 26), provided that in the event of gasworks being erected on certain lands, the gas company should make proper compensation to owners and occupiers of dwelling-houses within 300 yards of the gasworks for damage sustained thereby, and that the amount of such compensation should, in case of difference, be settled by arbitration in manner provided by the Public Health Act, 1875.

A claim by the plaintiff under s. 26 was duly referred to arbitrators, who appointed an umpire. The powers of the arbitrators lapsed on the 1st of January, 1886, whereupon the matters in difference became referred to the umpire. No award having been made by the umpire, and as his powers would expire on the 1st of March, 1886, the plaintiff applied to the company to consent to an extension of time. The company were willing to consent, but doubted whether consent would be of avail. The plaintiff therefore took out a summons at chambers to enlarge the time for making the award by the umpire in the arbitration until the 31st of March, 1886.

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The summons came on for hearing before A. L. Smith, J., who referred the case to the Court.

Asquith, in support of the motion. The Public Health Act, 1875 (38 & 39 Vict. c. 55), which is by s. 179 incorporated in the special Act, by s. 180, sub-s. 9, enacts that "The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him." No award has been made within the period there limited. But that provision only applies to extension of time by the arbitrators or by the umpire, as the case may be, as is shewn in the preceding sub-s. (8), speaking of failure by arbitrators to make their award within such extended time (if any) as may have been duly appointed "by them." The Court may extend the time under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 15, whereby "it shall be lawful for the superior Court of which such submission . . . . is or may be made a rule or order . . . . to enlarge the term for making the award." The words "such submission" include a statutory submission under the Public Health Act. *Kellett* v. *Local Board of Health of Tranmere* (1) may seem a decision to the contrary. But that case arose on the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the judgment on this point is that only of a single judge, who does not state reasons, but evidently thought that s. 15 of the Common Law Procedure Act, 1854, applied only to voluntary submissions, except submissions under the Common Law Procedure Act itself. If that were the decision, it has been overruled: *In re Dare Valley Ry. Co.* (2), where the time for making an award under the Lands Clauses Act, 1845, was enlarged by the Court under the Common Law Procedure Act, 1854. It is true that the words "in any case," which were not in the Public Health Act, 1848, are inserted in the Act of 1875, but they make no substantial difference. It was reasonable to limit the arbitrators' power of extending the time that they might not

(1) 34 L. J. (Q.B.) 87.

(2) Law Rep. 4 Ch. 554.

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protract litigation, but the same reason does not apply to extension by the Court. Although the parties have put a limit to the time the Court may, in its discretion, at any time under s. 15 of the Common Law Procedure Act, 1854, enlarge it: *Denton* v. *Strong* (1); Russell on Arbitration, 6th ed., p. 153; *Lord* v. *Lee.* (2) The consequences will be serious if the time cannot be enlarged, as the arbitration is compulsory. The questions in dispute are often intricate, a long and costly inquiry is necessary, yet if the time runs out before the arbitrator can reasonably hear all the matter and make his award, the expense incurred is thrown away. The respondents would consent to an order for extension of time, but they doubt if their consent would avail.

Masterman, for the defendant. Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180, sub-s. 9, the time shall not "in any case" be extended.

GROVE, J. By the true rule of construction of Acts of Parliament we must give the words used in them their plain meaning unless the context would render such construction manifestly absurd. It would not be manifestly absurd in the Act saying that the time for making an award should not be extended, particularly in arbitrations of this kind, which it is to the interest of all parties to have summarily decided. Therefore, the words may be read in their ordinary meaning, and this meaning is clear. The Act could easily have said the arbitrator shall have power only to extend the time for two months. But the words of the section are general and impersonal; "the time for making an award by arbitration under this Act shall not in any case be extended beyond the period of two months from the date of the submission." Can it be said this means that the arbitrators shall not extend the time beyond two months, but that the Courts may enlarge it as they think fit? Those words would have to be interpolated. But the section goes on, "And the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him."

The plaintiff seeks to insert the words "unless the Court or a

(1) Law Rep. 9 Q. B. 117. (2) Law Rep. 3 Q. B. 404.

judge should think fit." The Act was passed many years after the Common Law Procedure Act, 1854, and is applied to a different subject and different class of arbitrations. What other words more emphatic could the Act have used if finality was intended than those which are used?

STEPHEN, J. I am of the same opinion. I do not think we can make small amendments of Acts of Parliament by construing them against their natural sense. The natural sense of these words seems to be that stated by my Brother Grove. The strongest case cited to induce us to explain them away is that in the Court of Appeal, which decided that s. 15 of the Common Law Procedure Act, 1854, applied to arbitrations under the Lands Clauses Act, 1848. The distinction between that Act and the Public Health Act is obvious. The one was some years before and the other was twenty years after the Common Law Procedure Act, and the language is more emphatic. So I am obliged to agree with my Brother Grove that this application must be refused.

Application refused.

Solicitors for plaintiff: *Hughes, Hooker, Buttanshaw, & Thunder.*
Solicitors for defendant: *Blake, Snow, & Nephew.*

J. R.

1886
April 3.

BROCKLEHURST *v.* THE MANCHESTER, BURY, ROCHDALE, AND OLDHAM STEAM TRAMWAYS COMPANY.

Tramway—Liability for Accident—Tramways Act, 1870 (33 & 34 *Vict. c.* 78)—"*Act or default.*"

The General Tramways Act, 1870 (33 & 34 Vict. c. 78), regulating tramway companies authorized by statute to use tramcars in the public streets, enacts by s. 55 that "The promoters or lessees, as the case may be, shall be answerable for all accident, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages. . .":—

Held, that s. 55 applies only to a wrongful act or default, and does not make the promoters or lessees answerable for mere accident caused without negligence by their use of tramcars.

SPECIAL CASE stated on appeal from the Oldham County Court.

This was an action brought to recover the sum of 2*l.* 10*s.* for damages sustained by the plaintiff in consequence of his horse, harness, and trap having been run into by a tramcar engine belonging to the defendants, a steam tramway company, working (under parliamentary powers) certain tramways in the borough of Oldham, and in the suburbs thereof, and it was upon one of such tramways that the accident in question happened.

The plaintiff sought to recover damages for injury to his horse, which was thrown down in the highway by the steam-engine of the defendants drawing their tramcar. The driver of the engine first saw the horse, which was being driven by the plaintiff in a two-wheel trap, coming towards him at a distance of about fifteen yards, but did not hear the plaintiff shout to him, and consequently did not slacken speed until he was within two or three yards of the trap, when the horse being frightened became unmanageable, and backed across the tram-rails and was thrown down and hurt by the engine before it was possible to bring it to a complete stand. Under these circumstances the county court judge found that neither the plaintiff nor the defendants' servants were guilty of any negligence, and that horses otherwise quiet were liable to be frightened by this and other similar engines of the defendants, and could not safely be driven past them, and

that this caused the accident. He took time to look at the provisions of the General Tramways Act, 1870 (33 & 34 Vict. c. 78), to which the defendants' special Act was subject, and which by s. 55 enacts "that the promoters shall be answerable for all accident, damages, and injuries happening through their act or default . . . . by reason or in consequence of any of their works or carriages," and held that the word "act" could not be construed to mean wrongful act, and that the plaintiff was entitled to judgment for the amount of damages claimed in the plaint with costs.

The question for the opinion of the Court was whether the above judgment was right.

G. S. Bower, for the appellants. By the Manchester, Bury, and Rochdale Tramways (Extension) Order, 1882, confirmed in 45 & 46 Vict. c. ci., the construction of the defendants' tramway was authorized, and by s. 2, "The Tramways Act, 1870," was incorporated with the Order, and s. 55 of that Act, rendering the promoters or lessees answerable for "all accident, damages, and injuries happening through their act or default," is but a parliamentary recognition of the principle of *The King* v. *Pease* (1), and *Geddis* v. *Proprietors of Bann Reservoir* (2), that statutory powers to do acts which would otherwise be a nuisance do not relieve those who exercise such powers from the obligation of doing so with due care. But it is evident from its place in "miscellaneous clauses," and the terms used, that s. 55 refers to wrongful acts or defaults only, and could not have been intended to render the company absolutely liable for mere accidents happening from their lawful use of the tramway. The Act is to facilitate the working of tramways, but the effect of s. 55, if it bore the construction put upon it by the county court judge, would be to impede the working of them, and that section would render nugatory the rest of the Act. It was passed before steam was applied to street tramways. The words "works or carriages" relate to animal traction. If they were intended to apply to steam traction, the word "engines" would have been used.

The cases of *Jones* v. *Festiniog Ry. Co.* (3) and *Powell* v. *Fall* (4)

(1) 4 B. & Ad. 30.
(2) 3 App. Cas. 430.
(3) Law Rep. 3 Q. B. 733.
(4) 5 Q. B. D. 597.

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are distinguishable, for there the damage was done by the use of traction engines under the Locomotive Acts, which expressly declared that nothing therein should authorize the use of an engine so as to cause a public or private nuisance.

The respondent did not appear.

DENMAN, J. We are unable to support the ruling of the county court judge. I see nothing in the s. 55 itself to lead us to such a conclusion as that companies, which are authorized to run their vehicles by Parliament, should be liable for acts which are not imputable in any way of blame to themselves or their servants.

The section says that "the promoters or lessees, as the case may be, shall be answerable," &c. I think the object of this clause, which is one of a number headed "Miscellaneous," was to determine who shall be liable when there is liability, and not to increase the liability of the company or promoters or lessees beyond what would exist in the absence of such a clause. They shall be answerable "for all accident, damages, and injuries happening through their act or default, or through the act or default of any person in their employment by reason or in consequence of any of their works or carriages." It appears to me that "accident, damages, and injuries happening through their act or default" must be confined to accidents, damages, and injuries which happen through some wrongful act of theirs, either in the nature of an act of commission or an act of omission, or default, which is an act of omission; and that is the real distinction which is to be drawn between those two words. "By reason or in consequence of any of their works or carriages,"—that is, if either in laying down the tramways, or through any of the works, by an act of omission or commission, an accident happens, the promoters or lessees shall be answerable, and if in consequence of the legal user of the highway some wrongful act is done or neglect takes place, such as neglect to scotch a wheel, &c., and an accident happens through that, an action shall lie; but there is nothing in this Act to bring about such a result as that a company using their carriages on the tramway, which is authorized by Parliament, and having carriages properly constructed,

and as to which there is no act or omission which makes them unsuitable for use, and worked by servants guilty of no negligence, shall be answerable for a pure accident—not caused by any wrongful act or default. Nothing in the cases cited applies to this case. They are distinguishable, and we ought not to extend decisions on totally different Acts in favour of a case such as this. The tramway is authorized, the carriages used on it are lawful, there is no negligence in the user of the tramway or in the construction of the line, a horse, unfortunately overtimid, is frightened by the tramcar, there is no opportunity of stopping it at the moment; neither party is to blame. Under these circumstances we cannot hold that any such right of action exists as that which was thought to exist, and therefore this appeal must be allowed.

WILLS, J. I am of the same opinion. Notwithstanding that we have had an argument on only one side, I am unable to entertain any serious doubt, for it seems to me that the construction put on s. 55 by my Brother Denman is the only reasonable construction that can be put on it, and that of the learned county court judge would put the company in a considerably worse position than if their tramway were unauthorized. If there were no Act an action brought against them could not succeed unless the plaintiff shewed that what they had done amounted to a nuisance, or that there was some negligence. But here, if the county court judge was right they have a far wider liability and of a totally different kind, for it would be impossible to define the limit of it, and what pure accidents—for there are pure accidents—the company might not be made liable for.

Appeal allowed.

Solicitors: *Webb & Templeton.*

J. R.

1886

March 22.

WEBLIN *v.* BALLARD.

Master and Servant—Negligence—Employers Liability Act, 1880 (43 & 44 *Vict.* c. 42)—*What Defences open to an Employer when sued under the Act—Contributory Negligence.*

An employer, when sued under the Employers Liability Act, 1880, for personal injury to a workman caused by any of the matters mentioned in s. 1 of the Act, cannot avail himself of the defence that the injury was caused by the negligence of a fellow servant or that the workman had contracted to take upon himself the risks incident to the employment; but he may avail himself of the defence of contributory negligence on the part of the workman, and also, under s. 2, sub-s. 3, of his failure to give notice of the defect or negligence which caused the injury.

Upon an appeal from the judgment of a county court awarding compensation under the Act, the High Court is not entitled to consider whether the findings are such as the High Court would have arrived at; but can only consider whether or not there was reasonable evidence to support them.

The deceased was employed as fireman at the defendant's brewery. In the engine-room, at some distance from the floor, was a valve to turn on steam to a donkey-engine. This valve was only reached by means of a ladder placed against a lower pipe, but, by reason of a bend in the last-mentioned pipe, the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose for which it was used. The defendant had himself seen the ladder so used. The deceased was found dead in the engine-room, having been apparently killed by the ladder slipping while he was upon it. In an action by his personal representative under the Employers Liability Act, the county court judge found that there was a defect in the condition of the plant within the meaning of s. 1, sub-s. 1, of the Act, and that, although the deceased knew of the defect, he was excused from informing the defendant of it, because he was aware that the latter knew of it:—

Held, that this finding was warranted by the evidence, and that contributory negligence on the part of the deceased was not necessarily proved by the mere fact that he knew that the work was of itself dangerous.

ACTION by the plaintiff, as widow of William Weblin, under the Employers Liability Act, 1880 (43 & 44 Vict. c. 42), to recover damages for the loss of her husband, whose death was alleged to have been caused by reason of "a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," the defendant.

At the trial in the Brentford county court, without a jury, it appeared that the deceased was employed as fireman at the defendant's brewery. There were two pipes near the ceiling of the

engine-house; in one of them was a valve by means of which steam was communicated to a donkey-engine. To reach this valve an ordinary ladder was used. This ladder (when used for this purpose) was placed against the lower steam-pipe: but, by reason of a bend in the pipe, the ladder did not rest upon it securely. The ladder had been so used for about two years. The ladder had no hooks or stays whereby it could be steadied.

On the 18th of September, 1884, the deceased was found lying dead in the boiler-room, and the ladder was then standing edgeways or sideways. There was no direct evidence as to how he came by his death, but the plaintiff's case was that it was caused by the ladder slipping while the deceased was upon it, and that in his fall his head struck against the fly-wheel.

The judge, after twice viewing the premises, gave a verdict for the plaintiff for 156*l.*, saying that he came to the conclusion, from the evidence and the probabilities of the case, that the ladder, placed as it usually was by the workmen to turn the steam on or off the donkey-engine, "was manifestly a most dangerous method of getting at the upper valve, and therefore an unsafe way or portion of the defendant's plant, and for which the defendant and his manager, who were constantly on the premises, must be held responsible."

Dec. 12, 1885. *Finlay, Q.C.* (*Forrest Fulton*, with him), obtained a rule nisi to enter judgment for the defendant, or for a new trial on the grounds, that there was no evidence of a defect in the plant for which the defendant could be liable under the Act; that the accident arose from the improper use of the plant; and that the deceased was, upon the facts, guilty of contributory negligence.

March 16, 19, 1886. *M'Intyre, Q.C.*, and *Melsheimer*, shewed cause, and

Jelf, Q.C. Forrest Fulton, and *Marshall Hall*, were heard in support of the rule.

The nature of the arguments is stated in the judgment.

Cur. adv. vult.

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March 22, 1886. The judgment of the Court (Mathew and A. L. Smith, JJ.) was delivered by

A. L. SMITH, J. A point of very general application is raised in this case, viz. what defences are now open to a master when sued by a workman under the Employers Liability Act, 1880 (43 & 44 Vict. c. 42). To determine this, it is necessary to bear in mind how the law stood prior to the passing of the Act.

A servant might have sought redress from his master for personal injuries, subject to any defence the master might set up, in the following cases,—(*a*), for injuries sustained by the servant by reason of the negligence of the master himself,—(*b*), for injuries sustained by reason of the negligence of a servant acting within the scope of the master's employment,—(*c*), for injuries sustained by reason of the master having negligently provided defective or dangerous implements or materials.

To these causes of action the master might have set up, amongst others, the following defences,—traverse of the negligence, and contributory negligence on the part of the plaintiff. These defences the master had irrespective of the fact of his being master and the plaintiff being his servant. The master, however, had also, in addition to the above-mentioned defences, two other defences arising from the relative position of servant to master, and peculiar thereto. He had the defence of what we may term for brevity the defence of "common employment." He had also the defence that the servant had contracted to take upon himself the known risks attendant upon the employment. As to this last defence, see per Lush, J., in *Brooks* v. *Courtney* (1); and see *Griffiths* v. *Gidlow* (2), and *Holmes* v. *Clarke*. (3)

In what way, then, has the Employers Liability Act, 1880, affected the position of the master when sued by a workman under the provisions of that Act? By s. 1 it is enacted that, where personal injury is caused to a workman, the workman shall be at liberty to sue his employer for the five matters designated in that section, as qualified by the 2nd section; and that in *such* actions the workman shall have the same rights of compensation

(1) 20 L. T. 440.
(2) 3 H. & N. 648.
(3) 6 H. & N. 349; 7 H. & N. 937; 30 L. J. (Ex.) 135; 31 L. J. (Ex.) 356; 9 L. T. (N.S.) 178.

and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

What is the meaning of this? In our judgment, it means that the workman, when he sues his master under the provisions of the Act for any of the five matters designated in it, shall be in the position of one of the public suing, and shall not be in the position a servant theretofore was when he sued his master: in other words, that the master shall have all the defences he theretofore had against any one of the public suing him, but shall not have the *special* defences he theretofore had when sued by his servant.

What, then, is the result? It is this, that the defence of contributory negligence is still left to the employer, but the defence of common employment and also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement are taken away from him when sued by a workman under the Act. We agree to what was said by A. L. Smith, J., in the case of *Stuart* v. *Evans* (1); and we agree in what the late Mr. Justice Watkin Williams and our Brother Cave also therein said as to the defence of contributory negligence still being preserved to the master when sued by a workman under the Act.

In our judgment, however, the legislature, whilst taking from the employer the two defences above mentioned, has given him a statutory defence under s. 2, subs. 3, which theretofore did not exist. It is this:—The employer, when sued for a defect in the ways, plant, or machinery, may set up that the servant knew of the defect and did not communicate it to him, the employer, or to some other person superior to himself in the service of the employer. This, if proved, would avail the employer as a defence; and the only excuse which the workman would have for not communicating the known defect would be to establish that he was aware that the employer knew of it. The legislature has thus taken from the employer two defences, and given him another. This, in our judgment, is the true effect of the Employers Liability Act, 1880. We now apply this to the case in hand.

(1) 49 L. T. (N.S.) 138.

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The learned county court judge gave judgment for the plaintiff for 156*l*. He found that there was a defect in the condition of the ways or plant within the meaning of s. 1, sub-s. 1, as qualified by s. 2, sub-s. 3, of the Act. He found that, although the deceased knew of the defect, he was excused from informing the defendant of it, because he, the deceased, was aware that the defendant knew of it. He did not find that the deceased was guilty of contributory negligence.

Against these findings a rule was obtained to shew cause why the judgment should not be entered for the defendant, or a new trial had, on the grounds,—(*a*), that there was no evidence of a defect in the plant,—(*b*), that the accident arose from the improper use of the plant,—(*c*), that, upon the facts, the deceased was guilty of contributory negligence. The second and third grounds are practically the same.

Against this rule cause was shewn before my Brother Mathew and myself a few days since. It should be borne in mind that, this being an appeal from the county court, we are not entitled to consider whether the findings of the learned county court judge are such as we should ourselves have found. The sole point open to us upon appeal is on any question of law, and, as such, if there is any evidence (by which we mean reasonable evidence) to support the judge's findings. If there be, then the findings are absolute.

As to the point,—as to the defect in the ways or plant,—it was argued that, inasmuch as the ladder was of itself perfect, and as there was nothing amiss with the pipe against which it leant, therefore as a matter of law there could be no defect in the ways or plant within the meaning of the section. We do not agree with this. In *Heske* v. *Samuelson* (1), Lord Coleridge, C.J., upon this section said: "The question is whether the fact that the machine was unfit for the purpose for which *it was applied* constitutes a defect in its condition within 43 & 44 Vict. c. 42. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the Act."

(1) 12 Q. B. D. 30.

This judgment of Lord Coleridge was cited and approved, in the Court of Appeal, in *Cripps* v. *Judge*. (1)

There manifestly was evidence in this case that the ladder (being without hooks or stays) used as it was upon the crooked pipe, was not in a proper condition for the purpose for which it was used, and that therefore there was evidence of a defect in the condition of the ways or plant.

It was next argued, that, as a matter of law, upon the facts proved and stated by the judge, the deceased was guilty of contributory negligence. The facts proved and stated by the judge, who had twice viewed the place, to use the judge's own words, were as follows:—"The use of the ladder appeared by the evidence to have been so manifestly dangerous that every one who saw the ladder so used must have been aware of the danger." This, it was argued by the defendant, proved that the deceased had been guilty of contributory negligence.

We do not agree. The mere fact that the deceased knew that the work was manifestly dangerous of itself does not constitute contributory negligence. If it had been shewn that the deceased had used that which was dangerous in a negligent manner, that would have been contributory negligence. But this certainly was not proved: see *Holmes* v. *Clarke* (2) as to this.

In our judgment, the real defence which the defendant had upon the facts proved, was, the defence that the deceased had contracted to take upon himself the known risks attending the engagement: but, as above pointed out, that defence in an action like the present is not now left to the master. In our judgment, the defence of contributory negligence was not as a matter of law established by the evidence given.

Lastly, it was argued that the statutory defence under s. 2, sub-s. 3, was made out, because it had not been shewn that the deceased was aware that the employer knew of the defect, and that therefore the deceased was not excused from giving the information required by that sub-section. All we can say upon this, is, that there was evidence upon which the learned county court judge could, if he had been so minded, find that the

(1) 13 Q. B. D. 583. 30 L. J. (Ex.) 135; 31 L. J. (Ex.) 356; 9 L. T. (N.S) 78.
(2) 6 H. & N. 349; 7 H. & N. 937;

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plaintiff was aware that the defendant knew of the defect he has so found, and we cannot, for the reason above given, interfere with that finding.

This rule must therefore be discharged, with costs.

Rule discharged.

Solicitors for plaintiff: *Field & Dagg.*

Solicitors for defendant: *G. H. K. & G. A. Fisher.*

J. S.

March 30.

[IN THE COURT OF APPEAL.]

BRYANT, POWIS & BRYANT (LIMITED) *v.* READING.
E. C. READING, CLAIMANT.

Practice—Interpleader—Jurisdiction of Master—Summary Decision—Appeal to Judge at Chambers—Appeal to Court of Appeal—Order LIV., rr. 12, 21; *Order LVII., rr.* 8, 11.

On an interpleader summons at chambers the master decided, at the request of one of the parties, and having regard to the value of the subject-matter in dispute, to dispose of the claims in a summary manner, and he adjourned the summons for the production of evidence. The claimant objected that it was a case for an issue, and appealed to a judge at chambers, who dismissed the appeal on the ground that the decision of the master was final. An appeal from the judge at chambers to the Divisional Court was dismissed. On appeal to the Court of Appeal:—

Held, that the decision of the master was a summary decision within Order LVII., r. 8, and that therefore *Waterhouse* v. *Gilbert* (15 Q. B. D. 569) applied, and the Court of Appeal could not entertain the appeal.

Quære, whether under Order LIV., r. 21, all decisions of a master, including a decision in a summary way in interpleader, are not the subject of appeal to a judge at chambers.

APPEAL from an order of the Queen's Bench Division dismissing an appeal from Field, J., at chambers.

The plaintiffs recovered judgment in the action for a sum of 36*l.* and costs, and execution was issued and certain furniture seized by the sheriff. This being claimed by the wife of the defendant, the sheriff took out an interpleader summons, which came on for hearing before a master. The plaintiffs' solicitors asked the master, having regard to the amount in dispute, to dispose of the matter in a summary way under Order LVII., r. 8, and he decided to do so, and adjourned the summons to

enable the parties to produce evidence. Before the hearing of the adjourned summons the claimant appealed to Field, J., at chambers against the refusal of the master to order an issue and his decision to dispose of the merits of the claims and decide the same in a summary manner. Field, J., made no order, being of opinion that the decision of the master was final. The claimant appealed to a Divisional Court, consisting of Grove and Stephen, JJ., who dismissed the appeal. The claimant then brought this appeal.

Bonsey, for the claimant. It is not alleged on behalf of the claimant that there is any appeal from an order of a master made in a summary way in interpleader; but before the master can dispose of such a matter summarily he must decide that it is a proper case to be so treated. Against this decision of the master there is an appeal. The master has given no decision on the merits, but has decided that it is a fit case for him to hear on the merits, contrary to the contention of the claimant, who desires to have an issue and has appealed to the judge to overrule the master on this point. *Waterhouse* v. *Gilbert* (1) does not apply because there has been no decision of a Court or judge which, by statute, is final. The learned judge at chambers acted on the rule laid down by himself in *Westerman* v. *Rees* (2), but that decision is only applicable to the case of a final decision by the master on the merits. Even if this were such a decision it would be the subject of appeal to a judge, as in the case of costs, which are in the final discretion of a Court or judge, where the decision of a master or district registrar is nevertheless subject to appeal: *Foster* v. *Edwards*. (3)

Gore, for the plaintiffs. The determination of the master to hear the matter is a step towards disposing of it in a summary way. His disposing of the matter cannot be split up into two parts, the one a determination to hear the matter, and the other the determination of the matter itself. Under these circumstances *Waterhouse* v. *Gilbert* (1) shews that there is no appeal to this Court from the decision of the Queen's Bench Division.

Bonsey, in reply.

(1) 15 Q. B. D. 569. (2) W. N. 1883, p. 228.
(3) 48 L. J. (Q.B.) 767.

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LORD ESHER, M.R. In this case an interpleader summons was taken out by the sheriff and heard before a master, who decided not to direct an issue but to himself hear and determine the case summarily, and he adjourned the hearing of the summons for the purpose of giving time to the parties to get the evidence which should be brought before him. From this decision of the master there was an appeal to Field, J., at chambers, who decided that the appeal did not lie. An appeal was then taken to the Divisional Court, who held that there was no appeal from the master, and thereupon there is an appeal to this Court. One point which seemed to be raised was whether there was an appeal from the master to the judge at chambers. This depends on the interpretation of two rules, 8 and 11, of Order LVII., and two rules, 12 and 21, of Order LIV. Order LVII., r. 8, is this: "The Court or a judge may, with the consent of both claimants or at the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable to do so, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just," and rule 11 of the same order declares when such a decision is to be final. Now, it is argued that, inasmuch as by Order LIV., r. 12, the master has the authority and jurisdiction of a judge at chambers, interpleader not being one of the matters excepted in the rule, his decision, like that of the Court or a judge, is not open to appeal. I think this argument may well be contested on the ground that the order which deals with the decision of a Court or judge and makes that decision final and conclusive, does not apply to the decision of a master. Order LIV., rule 12, gives the master the authority and jurisdiction of a judge in such case, but that does not make his decision that of a Court or a judge, while rule 21 of the same order is explicit that any person affected by any order or decision of a master may appeal therefrom to a judge at chambers. Now, when we examine into the matter, we see that Order LIV., r. 12, is nearly a reproduction of the rules made under the Judges' Chambers (Despatch of Business) Act, 1867 (30 & 31 Vict. c. 68). (1) That Act has been repealed and its place taken by Order LIV., and rule 21 of that order is the

(1) See rules of Michaelmas Term, 1867.

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same in effect as s. 4 of the Act, and the distinction between the orders of a Court or a judge, and those of a master, is preserved.

In *Foster* v. *Edwards* (1) it was decided that s. 49 of the Judicature Act, 1873, which deals with appeals against orders made in certain cases by the High Court of Justice or any judge thereof, did not include orders made by a district registrar or master. It is not, as it seems to me, open to me to give a judgment on this point, because of the conclusion I have arrived at on the other point, but I think it will require consideration whether the argument as I have stated it does not shew that there was an appeal from the master's decision to the judge at chambers. The second point is whether there is any appeal to this Court, and, as to that, *Waterhouse* v. *Gilbert* (2) seems to me a distinct authority that in respect of any summary decision in interpleader no appeal lies to this Court. But then comes the further question whether this case is an appeal from an order on an interpleader summons in the nature of a summary decision. With regard to that, I think the attempted distinction is too fine, and that we cannot say that while the final decision of the master on the merits would be a summary decision, the step towards it taken by him when he determined that it was a proper case for the exercise of his jurisdiction was not also a summary decision. I think for these reasons we cannot entertain this appeal.

LINDLEY, L.J. I do not see how, consistently with *Waterhouse* v. *Gilbert* (2), we can entertain this appeal, for I cannot doubt that the decision of the master to adjudicate on the matter was a summary decision so as to come within the ruling of that case. As to the other point raised, I must say, though not by way of a decision on the matter, that I think, on the true construction of the rules, the decision of the master was not a decision of a Court or judge so as to preclude an appeal to a judge at chambers.

LOPES, L.J. I also think the appeal should be dismissed. Order LIV., r. 12, gives jurisdiction to a master in such a case as

(1) 48 L. J. (Q.B.) 767. (2) 15 Q. B. D. 569.

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the present, and rule 21 of the same order would, if we stopped there, clearly give a right of appeal from the decision of the master. In my opinion this is not affected by an order dealing with the decision of a Court or judge, which does not in any way refer to a master. If, therefore, the point were open to decision, I should say that, taking the rules and orders together, the argument could not be resisted that there was in this case an appeal from the master to a judge at chambers. I think, however, that we cannot entertain the appeal, as the case of *Waterhouse* v. *Gilbert* (1) shews that in such a case there is no appeal to this Court.

ppeal dismissed. (2)

Solicitor for claimant: *A. G. Ditton.*

Solicitors for plaintiffs: *Bompas, Bischoff, Dodgson & Coxe.*

A. M.

April 19.

NEWMAN AND OTHERS, APPELLANTS; JONES, RESPONDENT.

Licensing Acts—Club—Selling without Licence—Unauthorized Sale by Steward—Liability of Trustees—6 Geo. 4, c. 81, s. 26; 4 & 5 Wm. 4, c. 85, s. 17; 23 Vict. c. 27, s. 19.

The appellants, who were trustees and members of the managing committee of a club, were convicted under the Licensing Acts for selling liquor without a proper license to persons not members of the club. It appeared that the liquor was sold in the club premises by the steward of the club, who in selling it acted contrary to the orders of the appellants, and without their knowledge or assent. The money which he received for the liquor was paid by him to the account of the club:—

Held, that the conviction was wrong, for the appellants were not, under the circumstances, responsible for the act of the steward.

CASE stated by justices of Beacontree under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

At a petty sessions held at Stratford on the 25th of July, 1885, four informations were preferred against the appellants by the respondent, an officer of inland revenue,—1. for having, as trustees of the Cyprus Workman's Club and Institute, on the 12th of March, 1885, retailed certain spirits, to wit, one gill of brandy,

(1) 15 Q. B. D. 569. (2) See *Webb* v. *Shaw*, 16 Q. B. D. 658.

without having in force such a licence as was required by 23 Vict. c. 27, s. 19,—2. for having on the 17th of March, 1885, sold one pint of beer by retail, to be drunk and consumed in and upon their premises, without having an excise licence under 4 & 5 Wm. 4, c. 85, s. 17,—3. for having on the 12th of March, 1885, sold certain wine, to wit, one gill of port, without having a proper licence,—4. for having on the 17th of March, 1885, dealt in and sold certain tobacco, to wit, two cigars, without having a licence as required by 6 Geo. 4, c. 81, s. 26. The justices convicted the appellants of each of the above-mentioned offences, and adjudged them to pay the several penalties of 25*l.*, 10*l.*, 10*l.*, and 25*l.*, and costs, and in default of sufficient distress, awarded imprisonment for the several terms of two calendar months, one calendar month, one calendar month, and two calendar months respectively.

Upon the hearing, the justices found as facts, that the Cyprus Workman's Club and Institute was registered as a working man's club under the Friendly Societies Act, 1875 (1); and it was admitted that the appellants were trustees of the club (one of them being also the treasurer), who according to the rules of the club were admitted to the meetings of the committee of management, and to take part in the proceedings thereof and vote on any question under discussion; that the appellants as such trustees held office permanently until death, resignation, or refusal; that they were removable only by three-fourths of the members present at a special general meeting; that the secretary received all subscriptions and other moneys, and handed the same over to the treasurer; that the treasurer was responsible for such moneys as were paid to him by the secretary or by any person on account of the society; that he rendered his cash-account quarterly; that Leach (one of the appellants) was the landlord of the premises, and that the treasurer paid rent to him; that the club was under the management of a committee, but there was no evidence, nor was it shewn by the rules, how such committee was appointed; that the steward or manager of the club was employed by the committee and paid by the trustees, and that he had orders from the trustees and committee not to serve any one but members and affiliated members; that an affiliated member is an associate

(1) 38 & 39 Vict. c. 60.

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of the Working Men's Union Club, and that it was the common practice to allow affiliated members to introduce members; and that some kind of notice as to supply of liquor was posted up in the club, but there was no evidence of the contents of the notice.

The justices found that, on the 12th of March, 1885, John O'Connell, an excise officer, who was not a member or affiliated member, visited the club with an affiliated member (Musto), and ordered and was served with brandy, for which O'Connell paid 3*d.*; that, on the same occasion, O'Connell ordered port wine, beer, and brandy, which was served by the manager or steward, and for which he paid 1*s.* 6*d.*; that, on the 17th of March, O'Connell again visited the club with Musto and one Jones (who was not a member), and paid a member of the club, and also a member who was acting in the absence of the steward, for port wine, whisky, beer, and cigars at different times; and that he also paid the member acting for the steward for whisky and cigars which he brought away from the club.

It was contended for the appellants that they were not liable for the act of the steward or manager in selling the exciseable articles, inasmuch as he was not their servant, but the servant of the committee of management; and that, even if he were the servant of the appellants, he was acting not in obedience to but in defiance of the orders he had received,—the principle of law being that a master is not responsible for the criminal acts of his servant, unless he authorizes it or becomes an accessory after the fact. The case of *Condy* v. *Le Cocq* (1) was cited.

The justices—being of opinion that the trustees, as legal owners of the property of the club, and as actual members of the committee, taking a part in the proceedings thereof, and voting on any question, were responsible for the acts of the steward or manager or any person acting for him, although such acts were in direct disobedience of the orders of the committee and of the trustees and were done without their knowledge or assent, and in direct violation of the rules of the club—gave their decision against the appellants.

The question for the opinion of the Court was, whether under

(1) 13 Q. B. D. 207.

the above circumstances the appellants as trustees of the club were liable for the acts of their servants and delegates in selling the exciseable articles.

The case was argued on the 7th and 8th of April, 1886, by *Blackwell*, for the appellants, and *R. S. Wright*, for the respondent. The argument sufficiently appears in the judgment.

Cur. adv. vult.

1886. April 19. The judgment of the Court (Mathew and Smith, JJ.), was delivered by

A. L. SMITH, J. In this case, Thomas Jones, one of Her Majesty's officers of inland revenue, preferred against the appellants four informations,—first, for having, as trustees of the Cyprus Workman's Club and Institute, on the 12th of March, 1885, retailed one gill of brandy without having a licence, contrary to the provisions of 23 Vict. c. 27, s. 19,—secondly, for having, as trustees as aforesaid, on the 17th of March, 1885, sold one pint of beer by retail, without having an excise licence, contrary to the provisions of 4 & 5 Wm. 4, c. 85, s. 17,—thirdly, for having, as trustees as aforesaid, sold a gill of port wine, contrary to the statute in that behalf,—fourthly, for having, as trustees as aforesaid, sold two cigars without having a licence, contrary to the provisions of 6 Geo. 4, c. 81, s. 26. The justices convicted the appellants in the several penalties of 25*l.*, 10*l.*, 10*l.*, and 25*l.* and costs, and in default of payment adjudged distress for payment, and, in default of sufficient distress, imprisonment for the several terms of two months, one month, one month, and two months respectively.

The material point raised by the justices in the case submitted to us is this:—Even assuming (about which hereafter) that the relation of master and servant or principal and agent existed between the appellants and the steward of the club, who was the person who actually sold the articles in question to other than members or affiliated members of the club, can the appellants be convicted when they proved, as they did in the present case to the satisfaction of the justices, that the steward, in selling the articles as and where he did, acted in direct contravention of the bonâ fide orders given by the appellants, and in direct violation

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of the rules of the club, and without the knowledge or assent direct or indirect of the appellants thereto. Such, however, was the contention of the Crown.

It certainly sounded to us as novel; but it was insisted that such was the effect of the statutes; and it was said that there were authorities in favour of the contention. It becomes, therefore, necessary for us to examine them. It was very frankly admitted by Mr. Wright, on behalf of the Crown, that, if the proceeding in hand had been a prosecution for a crime, the prosecution could not be maintained: but he said that the statutes in question did not constitute the selling of the articles a crime, but only prohibited their sale by a penalty enforceable by distress and subsequent imprisonment in default of distress; and that the conviction could be upheld. He said that the statutes above-mentioned enacted that "every person who should sell liquors or cigars without a licence was liable to the penalties therein prescribed." So far he is correct. He then said that it was immaterial whether the appellants knew or did not know whether the articles were being sold, if sold they were by one who stood in the relation of servant or agent to the appellants; and he said that the authorities covered that proposition. That, however, is not the question now to be determined. The question is, whether a master or principal is liable when the servant or agent sells in direct contravention of the bonâ fide orders given, and without the knowledge or assent direct or indirect of the master or principal. The following were the cases cited:—

In the first place, he gave us the case, in 1824, of *Rex* v. *Marsh* (1), where it was held that, in an information under the 5 Anne, c. 14, s. 2, against a carrier for having game in his possession as carrier, it was not necessary to prove that the carrier had the game in his possession knowingly; and therefore, he argued, it was not necessary to establish in the present case that the appellants knew that the steward was making the sales. In our judgment all that was decided in that case was, that, upon proof given that the carrier had the game in his possession, a primâ facie case was made out, and that it lay upon him to rebut

(1) 2 B. & C. 717.

that case, which he could do by establishing that the game was not put into his waggon with his assent or was put in contrary to his orders. This case, as it appears to us, instead of establishing that for which it was cited, shews how a primâ facie case may be rebutted, as rebutted it was in the case in hand.

The next case cited was that of *Attorney General* v. *Siddon* (1), in the year 1830, in which it was held that a master was liable for penalties under the Smuggling Act (2) for the illegal act of his servant in concealing smuggled goods, the master being absent at the time when the act was done. The judgment of the Court proceeded upon the ground, as stated by Alexander, C.B., "that whatever a servant does in the course of the employment with which he is intrusted, and as part of it, is the master's act." "The legal presumption is so," says the Chief Baron, "unless the contrary be shewn." In the present case, it was shewn that the appellants did not authorize the acts of the steward, and the case therefore is no authority for the proposition put forward, but is a cogent authority against it.

The next case was that of *Davies* v. *Harvey* (3), where it had been held that a guardian of the poor was properly convicted for furnishing for his profit goods to be given in parochial relief, although he had no knowledge that the goods were to be given in parochial relief. This case was decided upon the ground that, although the defendant did not know for what purpose the goods were required, yet that his partner did, and that the goods were supplied by the partner within the scope of the partnership authority, for the profit of both partners. This case does not help the Crown; for, in the present case, the articles were manifestly sold beyond and without the scope of the authority given.

The case of *Mullins* v *Collins* (4) was next cited. In that case it was held that a licensed victualler was liable to be convicted under 35 & 36 Vict. c. 94, s. 16, for the act of his servant knowingly supplying liquor to a constable on duty. All that this case decided was that a licensed victualler was liable for the act of his servant within the scope of his employment: but it is no

(1) 1 Cr. & J. 220; 1 Tyrwh. 41.
(2) 57 Geo. 3, c. 123, s. 13.
(3) Law Rep. 9 Q. B. 433.
(4) Law Rep. 9 Q. B. 292.

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authority whatever for the liability of the master for the act of his servant outside the authority given.

It was then urged that the case of *Condy* v. *Le Cocq* (1) having held that the master under the same statute was liable even though neither master nor servant knew that the constable was on duty, that therefore it was an authority on behalf of the Crown. It was upon this case, as we are informed, that the justices to a great extent relied when they convicted the appellants. We cannot follow their ratio decidendi. Even assuming that the case was not decided upon the special wording of s. 16 of 35 & 36 Vict. c. 94, which it was, how does the fact of neither master nor servant knowing that the constable was on duty establish that the master is liable where a servant acts in direct contravention of the orders given? It does nothing of the kind.

The above were the authorities alleged to cover the Crown's contention in this case. It is manifest that they do not.

As to the point urged, that the money taken by the steward for the articles sold went into the coffers of the club, and not into the steward's pocket, we say that that would have been an ingredient for the justices to take into their consideration, when determining whether the steward, when he sold, was acting in reality in contravention of the orders given. But, inasmuch as the justices have determined, upon the facts proved before them, that the steward had orders from the appellants not to serve any one but members and affiliated members of the club, and that they were bonâ fide orders, and that he transgressed them, and as they convicted the appellants because they were legal owners of the property of the club and members of the committee, this point is of no avail to the Crown.

We give no judgment upon the point as to whether the steward was servant or agent of the appellants; for it is not material now to do so. We give judgment for the appellants with costs; and the conviction must be quashed.

Conviction quashed.

Solicitor for appellants: *E. Newman.*

Solicitor for the Crown: *Solicitor for Inland Revenue.*

(1) 13 Q. B. D. 207.

J. S.

LEA *v.* FACEY.

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April 5.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 5, 10, 12, 264, 341—*Improvement Commissioners—Urban Sanitary Authority —Notice of Action—Act "done under the provisions of this Act"—Penalty.*

The effect of the Public Health Act, 1875, which makes improvement commissioners under local Acts urban sanitary authorities, is to reconstitute them as new bodies under the Act, vesting in them as such new bodies the powers given by the local Acts as well as those given by the Public Health Act: and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local Acts are acting under the Public Health Act, 1875; and consequently are entitled in respect of such act to any protection or privilege given by that Act to members of local authorities acting under its provisions.

ACTION to recover a penalty of 50*l.* alleged to have been incurred by the defendant under ss. 9 and 15 of the Commissioners Clauses Act, 1847, by acting as a member of the Board of Improvement Commissioners for Abergavenny, under certain local Acts, when disqualified from so acting by reason of his being concerned in a contract made by the commissioners under the authority of such Acts.

The defence among other things alleged that the defendant had not received a notice of action as required by s. 264 of the Public Health Act, 1875, and also that the plaintiff had not obtained the consent of the Attorney-General to the action as required by the Public Health (Members and Officers) Act, 1885. The facts as they appeared at the trial before Wills, J., without a jury, were so far as material to this report as follows:—

By certain local Acts with which the Commissioners Clauses Act, 1847, was incorporated, a board of improvement commissioners was constituted for the Improvement Act district of Abergavenny, which board became by virtue of the Public Health Act the urban sanitary authority within such district. The defendant was a member of such board, and had acted as such by voting for the imposition of an improvement Act district rate. The rate was headed, "an assessment to a rate for general purposes upon the improvement Act district of Abergavenny, in the county

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of Monmouth, made, &c., to pay charges and expenses incurred by the Abergavenny Improvement Commissioners, for the three months ending on the 30th of September, 1885, by virtue of the Abergavenny Improvement Acts, 1854, 1860, and 1871, and the Towns Improvement Clauses Act, 1847, or one or more of the said Acts." The expenses to meet which the rate was made, as shewn by the estimate prepared previously to the making of it, were some of them expenses authorized to be incurred by the local Acts only, some of them expenses authorized by both the local Acts and the Public Health Act, 1875, and some of them expenses authorized by the Public Health Act, 1875, only.

It was alleged by the plaintiff that the defendant when so acting as commissioner was disqualified by reason of his being the lessee from the commissioners of certain premises, and that he had therefore incurred a penalty under the provisions of ss. 9 and 15 of the Commissioners Clauses Act, 1847. It was contended for the defendant that under the circumstances of the case there was no disqualification; but it is unnecessary to state the facts with regard to that point, as it will be seen from the judgment that the decision proceeded on the assumption that the penalty had been incurred, and that the sole question dealt with was whether the restrictions imposed on actions against members of urban sanitary authorities by the Public Health Act, 1875, applied or not to acts done by a member of a board of improvement commissioners, being an urban sanitary authority, in the exercise of the powers of the local Acts. The defendant had not received any notice of action, nor had leave to bring the action been obtained from the Attorney-General.

Ram, and *Daniell*, for the plaintiff. The defendant was not entitled to notice of action under the Public Health Act; nor was the consent of the Attorney-General to the action necessary. The defendant was clearly acting as one of the improvement commissioners, not under the provisions of the Public Health Act, but under the provisions of the local Acts. At any rate he was acting under the local Acts, if not acting under them exclusively. The rate purported to be made under and was made in part at least for the purposes of the local Acts. The operation of the

Public Health Act, 1875, is not to destroy the previously existing powers, capacities, and functions of the improvement commissioners, nor to merge their entity in a new body. They remain the same body, although they are made the urban sanitary authority, and as such receive new powers; the powers and capacities conferred on them by the Public Health Act are in addition to and not in substitution for their previously existing powers and capacities. If the defendant was acting under the local Acts as a member of the old body of commissioners constituted by such Acts, he is not entitled to the protection given by the provisions of the Public Health Act, which only extend to acts done under that Act. He may have been acting under the Public Health Act in making the rate, but he was clearly also acting under the local Acts. [The sections of the Public Health Act, 1875, cited and relied on in the arguments appear from the judgment.]

A. T. Lawrence, and *R. Cunningham Glen*, for the defendant. The effect of the Public Health Act, 1875, is to give a new status to the previously existing board of commissioners and create them afresh as the urban sanitary authority of the district, preserving to them as such newly constituted authority the same powers as they formerly had in their previous condition of existence, and giving them likewise the powers of the Public Health Acts. The contention for the plaintiff involves the proposition that the one body must be looked at as comprising two entities, viz., the improvement commissioners and the urban sanitary authority, and that the act which they do in making such a rate as this must be split up and treated as done by them partly in one capacity and partly in the other. It is submitted that it is one indivisible act done by the urban sanitary authority as one body. The opposite view would entail all manner of difficulties and anomalies in the construction of the Public Health Act, 1875, and in dealing with the functions of urban sanitary authorities under that Act. It is therefore contended that, inasmuch as the board were acting as the urban authority under the Public Health Act, 1875, in making this rate, the act done by the defendant in respect of which the penalty was alleged to have been incurred was an act done by him under the Public Health Act, 1875, and consequently he was entitled to the protections and privileges

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given by that Act to members of a local authority acting under it. They cited *Andrews* v. *Mayor of Ryde.* (1)

Ram, in reply.

WILLS, J. It is not disputed that, if the defendant who voted for the rate acted in so doing under the powers of the Public Health Act, 1875, he was entitled to notice of action: and the question is whether he was acting under that Act or, independently of it, under the local Acts. It is, to my mind, one of considerable difficulty. The Public Health Act has dealt with the previously existing local authorities in a fashion that is at times difficult to understand. But here, as in other cases, I think that it is necessary to go to the root of the thing, to begin at the beginning, and see exactly how it is that the legislature proposes to work out what I may call a kind of metaphysical unification of two different entities, the one the corporation existing under the local Acts, and the other the corporation existing under the Public Health Act. The scheme of the Public Health Act by s. 5, appears to have been to divide all England into certain districts, in each of which there was to be an authority either rural or urban: and each of such districts was to be subject thenceforth to the jurisdiction of the local authority established by such Act which was to be invested with the powers in the Act mentioned. Then came the question what was to be the local authority so invested with these powers. In such a district as this the new local authority, the authority constituted by the Act, was to be the ancient improvement commissioners; and here arises what I may call the metaphysical part of the question, that is whether, after this Act of Parliament has come into operation, the body, which was the same body in name and in constitution, is to be looked on as the old body, invested with additional powers, but still the old body essentially, or whether it is to be regarded as a new body under the new Act, possessing all the powers of the old body but still in its essence a new constitution of this Act of Parliament. That question lies at the root of the whole subject of discussion here. In order to determine that question, there are three sections which seem

(1) Law Rep. 9 Ex. 302.

to me to be material. The first is the 10th section, which says (in its latter clauses) that, where any local Act is in force within the district of an urban authority conferring on any trustees or other persons powers the same or similar to those of this Act, all the powers of such trustees or commissioners shall be transferred and attach to the urban authority. I think that applies both to cases in which improvement commissioners become the urban authority for the district within which their Act is in force, and to cases in which there is a town council or local board which becomes the urban authority, and within whose area improvement commissioners exercise powers under a local Act, such area not necessarily being coincident with the area over which the town council or local board exercise their powers. In such cases it says there shall not be two bodies but one body, and all the powers of the commissioners shall be transferred to the authority constituted under this Act. The section is important as indicating the desire of the legislature to absorb into the urban authority all the powers already exercised within the district of this newly-constituted authority. Then comes s. 12, which is applicable to the present case. It provides that after the passing of this Act, all property (real and personal), which belongs to and is vested in or would have been vested in improvement commissioners before this Act, shall continue vested in such improvement commissioners *as the local authority of their district* under this Act. That is significant in my opinion, because it seems to indicate that, but for this enactment, there would be a doubt as to whether the property which formerly belonged to the improvement commissioners continued to be theirs, or in what capacity it continued to be theirs, and the Act of Parliament solves that difficulty by saying that henceforth such property shall be held by the body of commissioners as the local authority under this Act. The scheme of the legislature seems to me to be rather to attach to the newly constituted authority the power of holding property which was possessed by the former body, and to vest the property which was held by the former body in the new body, than to perform the opposite process of saying that it should continue to be vested in the commissioners in their former status and capacity, and that to their former capacity should be added some

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additional powers. The section goes on to say that all debts and obligations incurred by any authority whose powers are exercisable by a local authority may be enforced against the local authority to the same extent and in the same manner as against the authority which incurred the same. This provision also seems to me to point in the same direction. Then there comes to be considered in connection with this group s. 341, which says that all powers given by this Act shall be deemed to be in addition to, and not in derogation of any other powers conferred by any other Act of Parliament, law or custom, and such other powers may be exercised in the same manner as if this Act had not passed. That means that the newly created body is to exercise not only the functions which were exercised by that body before, in the same way as before, but also it is to exercise all the powers given by this Act besides. It seems to me that the language of this section is consistent with either view. It is consistent with the view that the body of commissioners continue to be exactly the same as they were before, and do not have any change made in their status by this Act of Parliament which makes them the local authority. It is also consistent with the other view, viz., that the powers exercised under the local Acts are to be absorbed into a new body, having a new status, viz., that of being the local authority of the district.

On the whole I come to the conclusion that the intention of the legislature was to create the body afresh by this Act of Parliament, and to make it the local authority for the district within the meaning of this Act of Parliament, and to give it all the powers exercisable under this Act, as well as those exercisable under the former Acts. I will assume for the purposes of this discussion that the contract which was entered into by the defendant in this case with the body of commissioners was one which was within the powers of the commissioners, as they existed before 1875, and that it was one to which s. 9 of the Commissioners Clauses Act applies. I assume, therefore, that it is a contract to which a penalty attaches, and consequently, that the penalty is enforceable, if there is no other provision which prevents that penalty from being enforced under the Act of Parliament. Sect. 341 of the Public Health Act has been relied

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upon both ways on this point, but I really do not think that the proviso there, which says that nothing shall exempt any person from a penalty to which he would have been subject if this Act had not passed, applies to this case. This is not a question, in the view I take of it, of any exemption from the penalty, to which the defendant would have been liable before the Public Health Act was passed, and for which if it had not passed he would have been liable to be sued under the circumstances of the present case. The real question is whether he is entitled to the protection of s. 264, and whether this action can be maintained, the requirements of that section not having been satisfied. That depends upon whether what he did, when he voted for the imposition of this rate, was done under the provisions of the Public Health Act. I confess, after the best consideration I can give to it, I think it was an act done under the provisions of that Act, because I think, looking at it broadly, that the body of commissioners was altered in its character, status and attributes by that Act: and that, although no doubt what they did was done in the exercise of powers originally conferred upon them by the local Acts, yet, after the passing of the Public Health Act, and after they became the urban sanitary authority for their district, what they did even in the administration of the local Acts was done within the meaning of s. 264 under the Public Health Act. In the making of this particular rate the commissioners were exercising powers for a portion of which they must depend on the provisions of the local Acts; they must depend for another portion on the provisions of the Public Health Act; but taken in its entirety the making of this rate was one act, and in its entirety they could not have done it but for the powers conferred on them as the urban sanitary authority by the Act of 1875, which included, amongst other objects, the payment of rates and the interest on money borrowed for the purposes of the Public Health Act, and the authority to borrow which depended on that Act alone. If so, it was surely a rate made under the provisions of that Act, and none the less made under the provisions of that Act, because the effect of that Act was to clothe the newly constituted authority with the right

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of exercising the powers conferred upon it by the local Acts. It seems to me impossible to separate the act done into two: it is one operation, and it seems to me the only way out of the difficulty is to say broadly that after the Public Health Act came into operation, although part of the powers which were exercised were derived from the terms which are to be found in the local Acts, yet their exercise by the newly constituted authority was an exercise of the powers conferred upon that authority as a new creation by the provisions of the Public Health Act. It is impossible to deal with the questions raised in this case without getting more or less into subtleties whichever way it is looked at. This seems to me to be a much less subtle and more intelligible way of looking at it and more satisfactory than to say that in doing one thing the commissioners are at the same time doing two different things, that in one operation they are doing something which entitles every member to the protection of this section, and at the same time doing something which disentitles every member to the protection of this section. It seems to me that they can hardly, when they are doing one act, be at once entitled to protection and disentitled to it. It seems to me, therefore, that the latter enactment must prevail if there is a conflict or anything of the nature of a conflict, and the result is that to the liability to penalty is superadded the protection given by the provisions of the Public Health Act, which make it necessary to give notice of action and obtain the fiat of the Attorney-General before such an action can be brought. This result appears reasonable so far as the justice and morality of the case are concerned. For one cannot conceive that there should be any reason for subjecting the commissioners in respect to a matter of this kind to heavier liabilities than exist with regard to members of a local board. I cannot help thinking that the legislature did mean that, whenever the powers of local Acts were by virtue of the Public Health Act attached to the body in its new capacity, the protection of that Act should also attach. I therefore think (without going into many other subtle side questions which have been raised, without discussing whether this contract was originally within the powers of the Acts as they existed before 1875, or

any of the questions except the one I have dealt with), that on the broad ground which I have mentioned my judgment ought to be for the defendant, with costs.

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Judgment for the defendant.

Solicitor for plaintiff: *H. Thomas, for L. D. Browne.*

Solicitors for defendant: *J. T. & G. F. Marshall, for Gabb & Walford.*

E. L.

DRAYCOTT *v.* HARRISON.

April 2.

Husband and Wife—Wife's Separate Property—Income of Property subject to Restraint upon Anticipation—Judgment Summons—Proof of Means—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1.

Judgment for a debt and costs was recovered against a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint upon anticipation, unless by reason of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint. Upon an application for an order of committal against her under s. 5 of the Debtors Act, 1869, the only evidence of her ability to pay was that since the date of the judgment she had received sufficient income of separate property subject to a restraint upon anticipation:—

Held, that no order could be made against her upon that evidence, because s. 5 did not apply to the judgment.

MOTION to discharge or vary an order made by the judge of the County Court of Surrey, holden at Croydon.

In an action on a bill of exchange the plaintiff, on the 24th of November, 1884, recovered judgment against the defendant, a married woman, for 33*l.* and costs.

The judgment was entered in the following form:—"The defendant not having appeared to the writ of summons herein, it is this day adjudged that the plaintiff recover against the said defendant 33*l.* and 4*l.* costs, but that execution hereon be limited to the separate property of the said defendant not subject to any restraint on anticipation (unless by reason of the Married Women's Property Act, 1882, such property or estate shall be liable to execution notwithstanding such restraint)."

On the 3rd of March, 1886, the plaintiff applied to the county

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court judge for an order against the defendant under s. 5 of the Debtors Act, 1869.

On the hearing of the application the defendant was examined as to her means, and it then appeared that she was entitled under her father's will to property producing an annual income of about 180*l.*, which property was by the terms of the will vested in trustees for her separate use, without power of anticipation. She also admitted that since the date of the judgment she had received from the trustees income to the amount of about 200*l.*

The county court judge thought, on the authority of *In re Ives, Ex parte Addington* (1), that he had no power to make an order against the defendant for payment of the debt by instalments, and, being of opinion that she had means to pay, made an order committing her to prison for fourteen days. He gave the defendant leave to appeal, and directed that the warrant of commitment should not issue for twenty-one days. The defendant appealed.

W. E. Harrison, for the plaintiff, took the preliminary objection that no appeal would lie against the judge's order, and that the defendant's remedy was by moving for a prohibition.

[The Court said that in one form or the other they had jurisdiction to hear the matter, and, if necessary, they would treat it as though before them on motion for a prohibition.]

R. Henn Collins, Q.C. (*Ogle* with him), for the defendant. The county court judge had no jurisdiction to make the order of committal. The judgment in effect is against so much of the defendant's property as can be reached—not against herself personally—and none of that property can be reached because of the restraint upon anticipation. That view was adopted in *Meager* v. *Pellew* (2), though this point was not directly decided. In *Pike* v. *Fitzgibbon* (3) the Court of Appeal held that the separate property of a married woman, which she was restrained from anticipating, could not be attached, and all the judgments in that case distinctly establish the proposition that a married woman is bound by her contract only in respect of the separate

(1) 16 Q. B. D. 665. (2) 14 Q. B. D. 973.
(3) 17 Ch. D. 454.

property she has at the time of the contract, and that equity has attached the liability upon the contract, not to her, but to her estate. The execution is equitable, not against her, but against her estate; and what has happened in the present case constitutes an anticipation of her separate property, because the order is to commit her if she does not pay the judgment debt out of separate property which is subject to the restraint upon anticipation. "Proof of means" involves an ability to apply the means to payment of the debt. There can be no such ability where she is restrained from anticipating. Here the income came into the defendant's hands between the date of the judgment and the making of the order of committal, but the power of committal is only a mode of execution upon the judgment: it is not a punitive measure as a proceeding for contempt of Court is: *Swan* v. *Dakins*. (1)

W. E. Harrison, for the plaintiff. Before the passing of the Debtors Act, 1869, a married woman could be arrested on a capias ad satisfaciendum issued on a judgment against husband and wife, and she was not discharged until she shewed that she had no separate property. The practice is so stated in *Edwards* v. *Martyn*. (2) The object of the Debtors Act was simply to abolish imprisonment for debt where the debtor had no means of paying the debt. It is clear that that Act applies to married women, because if it did not, they would still be liable, as pointed out by Kelly, C.B., in *Dillon* v. *Cunningham* (3), to arrest and imprisonment under the old law. *Pike* v. *Fitzgibbon* (4) was decided in 1881, and the effect of that decision has been altered by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, which renders a married woman capable of contracting and rendering herself liable upon contracts in respect and to the extent of her separate property, whether acquired before or after the contract, as if she was a feme sole. In form the judgment is against her personally, though execution can only be levied against her separate estate, but it does not follow that the creditor is deprived of any other remedy he may have There is nothing in the Married Women's Property Act, or in

(1) 16 C. B. 77, per Jervis, C.J., at p. 92.
(2) 17 Q. B. 693.
(3) Law Rep. 8 Ex. 23.
(4) 17 Ch. D. 454.

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s. 5 of the Debtors Act to deprive him of his right to treat the defendant as a judgment debtor who has made default in payment of the debt. The question whether she has, or has had, means to pay is a question of fact which, in the present case, the county court judge has determined. As soon as the defendant received her income from the trustees she had means, and the judge had thereupon jurisdiction to make the order of committal.

R. Henn Collins, Q.C., in reply. Under the old law the power to give judgment against a married woman was only in the event of her not pleading coverture. The Act of 1882 enables judgment to be given against her without joining her husband, but the Act meant to leave the old law as it was, except that the equitable principle stated in *Pike* v. *Fitzgibbon* (1) was extended to separate property acquired by the wife after the making of the contract. Sect. 19 expressly provides that nothing in the Act shall interfere with or render inoperative any restriction upon anticipation contained in existing settlements. That provision would have no effect if the contention for the plaintiff be adopted. Pearson, J., in *In re Shakespear* (2) has carried forward the doctrine stated in *Pike* v. *Fitzgibbon* (1) and applied it since the Act of 1882 was passed. That case is an authority that, upon the true construction of s. 1 of the Act, a contract which can bind a married woman's separate property must still be a contract entered into at a time when she has existing separate property. Here the only separate property which the defendant had at the time of entering into the contract was subject to a restraint upon anticipation. She therefore had no separate property which she could bind, or in respect of which this judgment can be enforced.

[He also referred to *Bursill* v. *Tanner*. (3)]

MATHEW, J. This is a motion by way of appeal from the order of a county court judge, made under s. 5 of the Debtors Act, 1869, and ordering that the defendant be committed to prison for fourteen days. The judge made this order, being

(1) 17 Ch. D. 454. (2) 30 Ch. D. 169.
(3) 13 Q. B. D. 691.

satisfied upon the evidence before him that since the judgment was obtained the defendant had had means to pay the judgment debt. It was first contended by the plaintiff's counsel that no appeal could be brought against the judge's order. It was urged that s. 103, sub-s. 4, of the Bankruptcy Act, 1883, only had the effect of increasing the jurisdiction given to a county court judge by s. 5 of the Debtor's Act, 1869, so as to include cases in which the judgment debt exceeded 50*l.*, and that s. 5 of the Debtors Act gave the county court judge exclusive jurisdiction with respect to cases in which the judgment debt did not exceed 50*l.* The language used in s. 5 would certainly seem to give the judge absolute jurisdiction, but it has become needless for us to determine that question, which has not yet been decided, and is an important one, because, if the jurisdiction of the county court judge is absolute, the extraordinary result would follow that although an appeal will lie from an order of committal made under s. 5 of the Debtors Act, 1869, by a judge of the Queen's Bench Division, no appeal will lie from a similar order made by a county court judge. It may be well worthy of consideration whether the legislature can possibly have intended to place the county court judges in that position, but I do not now decide that question, because the only result of giving effect to the objection would be that another application, namely, for a prohibition, could be made to this Court. In order therefore to save expense to the parties, and to have the real question determined at once, this Court will mould the motion into the form of a rule for a writ of prohibition. The result of so doing of course is that if there was any evidence before the county court judge upon which he had jurisdiction to make the order of committal this Court has no right to interfere with the exercise of his jurisdiction. It was argued for the defendant that the judge had no jurisdiction whatever, and that in making the order he exercised an authority which he had not. It was said that both before and since the passing of the Married Women's Property Act, 1882, a married woman could only contract in respect of her separate property which was not subject to a restraint upon anticipation, and that judgment against her could only be in respect of that separate property. It was said that the judgment

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against the defendant here was a judgment against her personally, but that execution could only issue against her separate property, and that she had no separate property within the meaning of the judgment. It appears that she had separate estate to the value of about 180*l.* a year, but that estate was subject to a restraint upon anticipation. After obtaining his judgment the plaintiff waited until the defendant had received some of the income of her separate property from her trustees, and then applied to the county court judge, under s. 5 of the Debtors Act, 1869, in order to enforce payment of his judgment debt against her. The judge made the order, being satisfied that she had means to pay the debt. The question here is, had he power under the Debtors Act 1869, to make the order?

I am of opinion that he had not, because, looking at the language of the Act, I think that the provisions of s. 5 are intended to apply to debts which the judgment debtor is under a personal obligation to pay. Sect. 5 gives power to commit to prison in the prescribed manner, "any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment" of a competent Court. Now a judgment in its ordinary form imposes upon the defendant a personal obligation to pay the debt. A judgment in the form of the judgment in the present case does not impose that obligation. I think this case is not brought within the intent and meaning of the Act, for the reason that, if a married woman were liable to committal for non-payment of the judgment debt out of her separate property which she was restrained from anticipating, the equity doctrine that a judgment against a married woman can be enforced only against such of her separate property as is not subject to restraint upon anticipation, would practically be got rid of. In every case the creditor need only wait until the debtor had received money from her trustees, and then apply for an order of committal. In that way the restraint upon anticipation would indirectly, but inevitably, become of no effect. I think this case is neither within the language nor the spirit of the Debtors Act. I am, therefore, of opinion that the county court judge acted without jurisdiction in making the order, and that the defendant is entitled to a prohibition.

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A. L. SMITH, J. I have arrived at the same conclusion. In the course of the arguments I have felt a difficulty, which is not yet wholly removed, arising upon the phraseology of the Married Women's Property Act, 1882. By s. 1, sub-s. 2, "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," &c. Do those words mean that she is to be capable of rendering herself personally liable, or only liable in respect of her separate estate? The words are clear, that she can enter into and render herself liable as if she were a feme sole, not upon any contract, but only upon contracts in respect of her separate estate. On the whole I agree that she is meant to be no more capable of contracting and rendering herself liable upon contracts in respect of her separate property, which is subject to a restraint upon anticipation, than she was before the Act of 1882 was passed. Here the only separate estate she had was subject to a restraint upon anticipation. The plaintiff's judgment is properly drawn up in form, and the defendant's answer to the application to commit her is, "I have no property with which to satisfy that judgment, because I am restrained from anticipating the only property I have." I am, therefore, of opinion that the county court judge had no jurisdiction to make the order.

Application for a prohibition granted.

Solicitors for plaintiff: *John Hands, for Smith & Atkinson, Rye.*

Solictors for defendant: *Prior, Church & Adams.*

W. A.

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May 19.

[IN THE COURT OF APPEAL.]

MARRIOTT *v.* CHAMBERLAIN.

Practice—Discovery—Interrogatories—Material Facts—Disclosure of Names of Persons, though probably to be Witnesses—Libel—Justification.

In an action for libel the defendant pleaded that the libel was true. The substance of the libel was that the plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by the defendant had been sent round to the defendant's competitors in business. The plaintiff had in speeches and letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers and a firm of manufacturers at Birmingham, and that his informant in the matter was a solicitor of high standing at Birmingham.

In interrogatories administered by the defendant the plaintiff was asked to state the name and address of his informant, in whose hands he had seen the copy of the letter, and the names and addresses of the persons to whom the letter had been sent, and in whose possession the two letters existed; but he refused to do so on the ground that he intended to call those persons as his witnesses at the trial:—

Held, that the defendant was entitled to discovery of the names and addresses of such persons as being a substantial part of facts material to the case upon the issue on the plea of justification.

Appeal from the decision of a Divisional Court (Mathew and A. L. Smith, JJ.), affirming an order of Field, J., whereby he directed that the plaintiff should make further answer to certain interrogatories.

The facts were as follows:—

The action was for libel, the alleged libel being contained in a letter written by the defendant on the 19th of November, 1885.

The material part of the libel as set out in the statement of claim was as follows: "A little later he (the plaintiff) published a pamphlet, chiefly occupied with personal abuse of myself. I have never read this libel, but I am told that it contained the first sketch of the forged letter of which he (the plaintiff) has assumed the authenticity. Like some other false witnesses, he appears to consider that he is entitled to invent or repeat slanders without the slightest shadow of proof and to quote them ever afterwards as established facts, if the persons libelled do not think it worth their while to contradict them. . . . .

According to his own account he founded himself on the gossip of anonymous informants, and printed as an accurate and verbatim copy the letter which he now admits to represent his recollection of the substantial effect of an alleged conversation. I regret to say that I do not believe his statement. I do not believe that any respectable man in Birmingham told him (the plaintiff) that such a letter existed, or had ever been written. I am convinced that the letter is a pure fabrication of Mr. Marriott himself, who thus secured his object and created a temporary sensation by the exceptional grossness and license of this attack on a public man whose position almost necessarily precludes reply."

The statement of defence admitted the writing and publication of the libel, and justified it in the following terms: "Before and at the time of the publication of the alleged libel the plaintiff was a candidate for the representation of Brighton in parliament, and the plaintiff had on various public occasions (and amongst others at Brighton during the course of and for the purposes of his said candidature) published of the defendant, in letters, pamphlets, and speeches, words charging the defendant with pretending to a character to which he was not really entitled, and alleging in particular that the defendant, when a member of a firm of screw-makers at Birmingham called Nettlefold & Co., had amassed a fortune by grinding down poor people and by (amongst other means) writing and sending to many persons, including the less wealthy competitors of the said firm, a certain threatening letter signed with the defendant's name, of which letter the plaintiff alleged that he had seen a copy, with intent (as suggested by the plaintiff) to compel them to enter into arrangements with the said Nettlefold & Co., or to discontinue their business. The said allegations so made by the plaintiff relating to the conduct of the defendant when and as a member of the said firm, and to the alleged writing and sending by the defendant of the said alleged threatening letter, were admitted by the plaintiff in his said letters, pamphlets, and speeches to be founded on hearsay, except as to the said copy letter which he alleged that he had seen. The said charges, imputations, and allegations so made by the plaintiff were false in every parti-

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cular, and the said allegations as to the said alleged letter had been publicly contradicted by the defendant (as the plaintiff then knew) before they were repeated by the plaintiff as aforesaid. There was no such letter, and the plaintiff had not seen a copy of any such letter. The defendant says that the words of the said libel are, according to their fair and ordinary meaning, true in substance and in fact."

The defendant administered interrogatories to the plaintiff, among which were the following:—

"(6.) Did you ever prior to the making of your said speeches (certain speeches referred to in a previous interrogatory, extracts from which were annexed to the interrogatories), and when first and where and in whose hands see the original or any written copy of the letter alleged by you in your said speeches to have been signed by the defendant, and to have been sent by him to the competitors of the firm of Nettlefold & Co.? If yes, did you at the time or afterwards, and when, make or cause to be made or obtain any copy of the said letter? Is such copy, if any, now, and if not when was it last in your possession, custody, or control?

"(8.) Give the names and addresses of the manufacturers of screws to whom you allege in your said letter (a letter written by plaintiff to defendant on the 16th of November, 1885, and referred to in a previous interrogatory) and speeches that the said letter alleged by you therein to have been signed by the defendant was sent by the defendant?

"(9.) Did you not on or about the 21st November, 1885, write and cause to be published in the *Standard* newspaper of 24th November, 1885, the letter a copy of which is annexed to these interrogatories and marked E.? If yes, give the names and addresses of the 'solicitor of high standing in Birmingham,' the 'eminent banking firm,' and the 'firm of manufacturers at Birmingham' therein mentioned."

An extract from a speech made by the plaintiff at a public meeting on the 4th of April, 1884, was annexed to the interrogatories, from which it appeared that the plaintiff had spoken to the following effect: "Mr. Chamberlain was a very rich man, and the question he" (the speaker) "wanted the working classes

and all people whom Mr. Chamberlain addressed and before whom he posed as their saviour, to consider was: what his personal character had been as a business man? In Birmingham he was in business in the screw trade, which was a monopoly of a certain company called Nettlefold & Co. When he was in that company there were a number of small and honest and intelligent workers in the same business; but to make his fortune he wished to crush or buy up these small opponents. He" (the speaker) "knew that for a fact, for there was a letter which was sent not to one but to many of these opponents and signed by Mr. Chamberlain's name. He had seen a copy of one of those letters, and, although he could not give the exact words, he could give the spirit of it, and if it was not true let Mr. Chamberlain deny it. The letter was headed 'Nettlefold & Co.,' and was to this effect: 'Dear Sir—We must make hay while the sun shines. Are you prepared to sell your screws at 70 per cent. discount? If you are not, we are, and we have 100,000*l.* behind us. At the same time we are willing to come to terms if you are.—Yours, truly.—J. Chamberlain.'"

Another extract was annexed to the interrogatories from a speech made by the plaintiff on the 12th of October, 1885, to a somewhat similar effect as that already set out.

The letter, a copy of which was annexed to the interrogatories and marked E, was as follows. It was a letter written by the plaintiff to the *Standard* by way of answer to a letter written by the defendant to a Brighton newspaper, and contained this passage: "I quoted a specimen of the letters which were sent out to establish this monopoly. Of the monopoly Mr. Chamberlain wisely takes no notice. Of the letters he says they are my invention. He must know this to be untrue. My informant is a solicitor of high standing in Birmingham, one whose name is as well known to Mr. Chamberlain as to myself, and at a proper time I shall be ready to make it public. Two such letters at least are now in existence, one in the keeping of an eminent banking firm, and the other of a firm of manufacturers at Birmingham."

The plaintiff's answer to the interrogatories above set forth, which was objected to as insufficient, was as follows: He admitted

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writing the letter referred to in the 9th interrogatory, and proceeded: "To the 6th interrogatory I answer that prior to the making of the speeches therein referred to I did not see the original, but I did see for the first time on or about the 29th day of February or the 1st of March, 1884, at Brighton, a written copy of the letter in the said interrogatory referred to, and I did at the time obtain a copy of the said letter, which was for some time in my possession, but I have since lost the same, and cannot say when it was last in my possession. I did not allege in any of my said speeches that the said letter was signed by the defendant. I stated that it was signed by the name Joseph Chamberlain. I decline to state in whose hands I saw the said written copy on the ground that I intend to call such person as a witness at the hearing of this action, and on the same ground I decline to give the names and addresses asked for in the 8th and 9th interrogatories."

Field, J., at chambers, ordered that further answers should be made by the plaintiff to the 6th, 8th, and 9th interrogatories, and on appeal the Divisional Court affirmed his order.

Sir R. E. Webster, *Q.C.*, and *Ram*, for the plaintiff. The rule is, that a party to an action is entitled to discovery of material facts which are in issue, but not of the names of the witnesses by whom or of the evidence by which they are to be proved: *Eade* v. *Jacobs* (1); *Benbow* v. *Low* (2); *Attorney-General* v. *Gaskill*. (3) The persons of whose names the defendant claims discovery are the witnesses by whom the plaintiff must necessarily prove his case in answer to the plea of justification.

[FRY, L.J. referred to the case of *Storey* v. *Lord Lennox*. (4)]

But the names of these persons are not facts directly material which are in issue. The fact in issue is, whether the plaintiff fabricated the existence of this letter or not. Who the persons are in whose hands such letters exist, or in whose hands the copy was seen by the plaintiff is not a matter in issue, but merely evidence of such matters. Similar considerations apply in regard to the name of the plaintiff's informant, and the names of the persons

(1) 3 Ex. D. 335.
(2) 16 Ch. D. 93.
(3) 20 Ch. D. 519.
(4) 1 Keen, 341.

to whom the original letters were sent. An original letter might never have existed, and yet, if the plaintiff had reasonable grounds for thinking that it did, the defendant would fail to prove his plea of justification. Therefore the existence or non-existence of the original is not material, except by way of evidence. A party is not bound to discover in answer to interrogatories every collateral fact from which an inference may be drawn as to the existence or non-existence of a fact in issue. If it were so, every question that could be put in cross-examination would be admissible by way of interrogatory. The questions which the defendant seeks to compel the plaintiff to answer are questions as to collateral matters as to which the plaintiff may be cross-examined at the trial, but it does not follow that they are properly matter for interrogatories. The names of these persons are mere details of the case for the plaintiff, which he will have to prove at the trial; they are not part of the defendant's case, and the defendant is not entitled to discovery of them. The defendant's case is that there was no such letter: if so, there can be no persons in whose possession such letters exist. The defendant says that the story is all a fabrication, and that the plaintiff had seen no copy of the letter. Therefore he could not have seen such a copy in any one's hands according to defendant's case. A party is not entitled to cross-examine by interrogatories as to the collateral details of his opponent's case in order to disprove it. These interrogatories do not go to matters which tend to prove the defendant's case, but the reverse.

Sir Charles Russell, Q.C., A.G., Sir Henry James, Q.C., and *R. S. Wright*, for the defendant. The plaintiff may bonâ fide intend at the present moment to call these persons as witnesses, but it does not follow that they will be called at the trial. If a fact is material, the right to discovery of it is not ousted, because such discovery may involve disclosure of the names of persons who probably will be witnesses. The issue on the plea of justification must turn on the questions whether these alleged letters existed, and whether the plaintiff had grounds for supposing that they did. The plaintiff having shewn by his statements what the facts are on which he will rely for disproving the justification, the defendant is entitled to information as to the material circum-

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stances of such facts. He is entitled to know the names of the persons alluded to by the plaintiff in order to identify them and to ascertain how far their status and character could have afforded the plaintiff any trustworthy ground for believing in the existence of the letter. The defendant has to prove a negative; but how can he do so except by disproving the facts as alleged by the plaintiff, and how can he disprove such facts without information as to their material circumstances? They cited *Saunders* v. *Jones* (1); *Stainton* v. *Chadwick* (2); *Grumbrecht* v. *Parry* (3); *Attorney-General* v. *Corporation of London.* (4)

Sir R. E. Webster, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiff has brought an action for libel. The libel complained of appears in substance to be a statement that he fabricated a story with regard to his having seen a copy of a certain letter alleged to have been written by the defendant's firm. The defendant justifies, and undertakes to prove that the plaintiff did fabricate the story. What does that proof involve? It would in the first place be material for the defendant to prove that no such letter was ever written. That, if it could be proved, would go to shew that there could not have been any copy of such letter, and that it was unlikely that any alleged copy really existed. Secondly, it would be material to prove that no copy or alleged copy of any such letter ever existed. If those two facts could be established, the defendant would have proved his case, because, if there never was such a letter, or any such copy, or alleged copy, it follows that the plaintiff must have fabricated the story. It would on the other hand be material for the plaintiff by way of destroying the case set up by the defendant to prove the existence of the original letter, the existence of the copy, and that the copy was shewn to him. Those are facts which he need not necessarily put on the record, for all that he need do in his pleadings is to deny what the defendant asserts when he alleges the truth of the libel; but they are facts which, if proved, would be material as disproving the defence set up by the defendant. Now it appears from documents that

(1) 7 Ch. D. 435.
(2) 3 Mac. & G. 575.
(3) 32 W. R. 558.
(4) 2 Mac. & G. 247.

are before the Court, viz., letters and reports of speeches of the plaintiff which he does not deny, that the plaintiff actually does assert those facts in answer to the defendant's allegation that the story of the letter is a fabrication. He asserts in terms that there was a copy of the letter, and that it was shewn to him, or at any rate he was informed of its contents by persons on whose statements he was entitled to rely and did rely. Again, the defendant having denied the existence of the original letters which were alleged to have been sent round to the smaller manufacturers, the plaintiff has asserted in answer to him that there were such letters, and that two such letters are in the hands of certain bankers and others. He has condescended upon the facts on which he relies, and has declared that his case in answer to the defendant's depends upon certain facts which he is in a position to prove, and which if proved will be fatal to the defendant's case upon the plea of justification. Under these circumstances the question is, whether the defendant has not a right to insist on being informed in answer to his interrogatories of all the material circumstances, of all the substantial part of these facts so asserted by the plaintiff.

Various grounds are relied upon on behalf of the plaintiff in support of the contention that he is not bound to answer further. First it is said that, even if the names of the persons in question are a substantial part of material facts and the defendant would otherwise be entitled to discovery of them, the defendant has no right to have them disclosed, because the plaintiff has sworn that he intends to call these persons as witnesses. I cannot see how that can be any sufficient reason for exempting the plaintiff from the obligation to disclose the names, assuming that he would otherwise be bound to disclose them. Assuming that the plaintiff does bonâ fide intend at present to call these persons as witnesses, it does not follow that they will be called at the trial. Then it is said that the defendant is not entitled to interrogate as to these facts, because the plaintiff did not set them up till after the cause of action arose; but I cannot see why, if a party sets up certain material facts as constituting his case at any time, the other party should not be entitled to interrogate as to the substantial portion of them. Again, it is said that the facts required to be

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stated are merely matter for cross-examination of the plaintiff. But cross-examination, however skilful, unless there are some materials in the possession of the cross-examining counsel for contradicting or checking the witness, is often a very unsatisfactory mode of getting at facts. It does not appear to me that there is anything in any of the reasons that have been put forward to shew why the plaintiff should not answer further, assuming that the matters as to which the further answer is required are matters forming a substantial part of the facts material to the issue, and not merely the names of witnesses or mere evidence of such facts.

We must then consider the various matters in question to see whether they are a substantial part of any fact material to the issue. First, as to the persons in whose possession it is alleged that the original letters are. No doubt it will be a matter in dispute at the trial, though not directly in issue on the pleadings, whether such letters were ever written. I cannot help thinking that the existence or non-existence of such letters is a fact material to the issue. I think it must at any rate reduce the damages very much, if it were proved that there never was any such letter written by the defendant or his firm. Be that as it may, in any case the existence or non-existence of the original letters, though not a fact directly in issue, is a very material fact with regard to the inference that may be drawn from it as to the fact in issue. The plaintiff says that there are such letters in existence in the hands of persons in Birmingham. It being a fact in dispute whether such letters ever existed, it seems to me to be a material part of the fact as alleged by the plaintiff who such persons are. It is one of the substantial circumstances of a fact that will be in dispute between the parties at the trial upon the issue on the plea of justification, and the plaintiff, having condescended on the facts on which he relies, must state the substantial circumstances of them. Next, with regard to the copy of the letter; the issue on the pleadings apparently being whether the plaintiff fabricated the story, it will be a matter material to such issue, though not itself directly in issue, whether any such copy existed, or whether statements were made to the plaintiff leading him to think that it did exist. Here, again, the plaintiff has condescended on certain facts in

relation to the matter. He has stated that he has been shewn a copy, and has vouched a certain solicitor and others in relation to the existence of such copies. That, again, is in my opinion a material fact which will be in dispute at the trial, and which, if proved, may be fatal to the defendant's justification; and it seems to me that it is a substantial portion of the fact who these persons are. It does not, to my mind, signify, in dealing with these questions, on whom it lies to prove the facts with regard to which the interrogatory is put. These facts may be called part of the plaintiff's case, but, if they are, I think the defendant has a right to interrogate with regard to them, because they are part of the plaintiff's case. The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.

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On the grounds which I have stated I think that the decision of the Court below was right.

BOWEN, L.J. I am of the same opinion. It appears to me that it is impossible, in considering what the right of a party to have discovery by interrogatories may be, to look only to the issue as apparent on the pleadings, for it may well be that at the trial the case may depend on matters not directly put in issue by the pleadings. The parties may shew, and I think in this case they have shewn, by the way in which they have conducted their controversy, that, when the case comes to trial, the matter will be fought out on certain lines, though such lines are not disclosed by the pleadings. It seems to me that in the present instance the plaintiff has placed his case on a certain basis, the firmness or infirmity of which will make all the difference at the trial; and

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that the defendant will not have a fair chance of disproving the case so set up by the plaintiff, unless he is told with somewhat greater particularity what it is. The libel charges the plaintiff with having fabricated a story about a copy of a letter supposed to have been written. So the plaintiff has two strings to his bow. He may say, first, that the letter existed in fact, or secondly, by way of alternative, that, though it did not exist, he had reasonable grounds for supposing that it did exist. If he succeeds in establishing either of these positions he wins the action. The defendant's case must be that no such letter existed, and that the plaintiff had no reason for thinking that it did. He has not two strings to his bow, but must prove both these propositions. If he fails to prove both, he fails to support the onus thrown upon him. Anything, therefore, which tends to prove or disprove either of those propositions is material to his case. The plaintiff in the course of the controversy between himself and the defendant in order to make good his position has condescended on certain facts as constituting his case. He says in effect that he was shewn a copy of the letter by a person on whom he could rely, and that duplicates are now in the possession of particular persons. The truth or falsehood of these statements will make all the difference in the aspect of the case. Suppose that it is shewn that there was no such letter written as alleged, and that the plaintiff had no sufficient reason for thinking there was, the effect must be at any rate greatly to reduce the damages, because it would be shewn that the plaintiff's attack on the defendant was groundless. It is obvious therefore that the facts so asserted by the plaintiff will be, to say the least, very material, if proved at the trial, and it is most essential to the defendant's case to be able to disprove them. In order to do so and to prove his negative he wants the plaintiff's affirmative made somewhat more specific. It is said by the plaintiff's counsel that to compel the plaintiff to give the fuller information asked for will be to compel him to disclose the names of his witnesses. But, although one party cannot compel the other to disclose the names of his witnesses as such, yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist to information with regard to such fact is not displaced by the assertion that such information involves the

disclosure of the name of a witness. It seems to me that, as the controversy between these parties has shaped itself, the information required is relevant to the defendant's case and must therefore be given. The case of *Storey* v. *Lord Lennox* (1), cited by my Brother Fry, appears to me to shew that the mere fact that the discovery sought will involve the disclosure of the names of witnesses is not a sufficient reason for refusing such discovery. The case of *Eade* v. *Jacobs* (2) is not at all inconsistent with our present decision. What was there asked for was evidence; not information as to a material fact which could be proved at the trial, but mere evidence by which material facts were to be proved.

FRY, L.J. The questions which arise in this case are three in number. One relates to the names of persons who were said to have given information as to these letters, or to have shewn a copy to the plaintiff; another relates to the names of persons in whose possession originals of the supposed letters were said to be and the third relates to the names of persons to whom the letters were sent. It seems to me that slightly different considerations apply to these three questions respectively. I think that the defendant is clearly entitled to discovery of the names of persons comprised in the first question. The defendant has taken on himself the burthen of proving what the libel asserts, viz., that the whole story as to the letters has been fabricated by the plaintiff. To prove this he must shew two things; first, that the alleged letter was never written; and secondly, that the plaintiff had no ground for believing in its existence. It is material to the latter branch of his case to know who the persons are from whom the plaintiff asserts that he derived his information. If such persons exist and are persons of respectability and character, whose statements would afford sufficient ground for belief in the existence of the letter, the case for the plaintiff is made out; but, if the persons whose authority is vouched by the plaintiff are persons whose statements no reasonable man could suppose to be trustworthy, this fact would go far to support the defendant's case. It seems to me, therefore, that the names of these persons are material and

(1) 1 Keen, 341. (2) 3 Ex. D. 335.

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relevant to the fact which the defendant has to prove. This question then arises: the general rule being that a party is entitled to discovery of material facts, but not of the names of the witnesses by whom they are to be proved, and it being impossible for the other party to disclose the facts without also disclosing the names of his witnesses, is the right to discovery to give way to the right to protection from giving the names of the witnesses, or vice versâ? That question seems to me to have been answered by Lord Langdale in the case of *Storey* v. *Lord Lennox* (1) fifty years ago. He there says, "the defence here is that the letters may disclose the names of the witnesses and the evidence; and so indeed may every discovery which the defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the plaintiff that which will enable the plaintiff to learn the names of the witnesses and the nature of the evidence; and if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the Courts of Equity would be lost."

I think that the law still is as there laid down, and the mere circumstance that in making discovery of relevant facts the names of witnesses must be disclosed is not sufficient to take away the right to discovery. The present case is remarkable in one point of view, because the plaintiff has himself volunteered the statement that these persons will be his witnesses. It would not have been apparent that they would be, but for his statement; for it is quite possible that the statements made by them could be proved by other persons who heard them. With regard to this part of the case, I think that the appeal entirely fails. With regard to the other two questions I confess that I feel more doubtful. It would no doubt be a relevant fact that originals of these letters exist; but I feel some doubt how far the question in whose hands they exist is a substantial part of the case which the plaintiff is bound to disclose on interrogatories. However, as the majority of the Court are clear on the point I fully believe that my doubts are groundless. With regard to the remaining question also, I should have felt some doubt, but for the opinion of the Master of the Rolls and my Brother Bowen, whether we

(1) 1 Keen, 341.

are not going too far in ordering discovery of the names of the persons to whom it is alleged that the letters were sent; but I yield to their view of the case. For these reasons the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Gedge, Kirby & Millett.*

Solicitors for defendant; *Sharpe, Parkers, & Co., for Rylands, Martineau & Co.*

E. L.

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May 10, 11.

Bankruptcy — Married Woman — Separate Property — Settlement — General Power of Appointment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 24 *—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 5, *s.* 19.

Real property was by a marriage settlement vested in a trustee in trust for the married woman for life for her separate use without restriction on anticipation, with remainder to such persons for such estates as she might, whether covert or sole, by deed or will appoint, and in default of appointment to her children in fee. The settlement also contained a provision under which the property could be sold or mortgaged by her direction, and the proceeds paid to her:—

Held, that she was subject to the provisions of the bankruptcy laws in respect of such property as being her separate property, under s. 1, sub-s. 5, of the Married Women's Property Act, 1882, and should therefore be directed to exercise the power of appointment in favour of the trustee in bankruptcy of her estate under s. 24 of the Bankruptcy Act, 1883.

APPEAL from the refusal by a county court judge of an application by the trustee of the property of a bankrupt for an order under s. 24 of the Bankruptcy Act, 1883, directing the bankrupt to execute a deed of appointment of certain freehold property.

The bankrupt was a married woman who had carried on a trade separately from her husband. Previously to the marriage in November, 1881, she had executed a marriage settlement by which she conveyed the freehold property in question, which consisted of certain houses, to a trustee in trust to pay the residue of the rents and profits, after keeping down the interest on a mortgage, to her during her life without impeachment of waste, for her sole and separate use, without any restriction on

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anticipation, and, after her decease, upon trust for such person or persons, for such estate or estates, interest or interests, and generally in such manner as she should, whether covert or sole, by deed or will appoint, and in default of any such appointment, and so far as such appointment should not extend, upon trust for her son by a previous marriage and his heirs, and for all and every the child or children of the intended marriage and their heirs, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and, if more than one, in equal shares as tenants in common, and subject to the trusts aforesaid for the right heirs of the settlor. It was further provided by the settlement that the trustee should during the life of the settlor, with her consent in writing, have a power of sale and exchange over the hereditaments thereby settled, and should, with the like consent, have power to raise by way of sale or mortgage of the said hereditaments or any of them such sum or sums of money as she might direct, and pay the same to her, and that her receipt for the same without the concurrence of her husband should be a sufficient discharge. Upon the bankruptcy of the settlor, the trustee in bankruptcy of her property applied to her to execute a deed of appointment of the hereditaments comprised in the settlement in his favour as such trustee, but she refused to do so. The trustee thereupon applied to the county court for an order directing her to do so under s. 24 of the Bankruptcy Act, 1883.

May 10. *Herbert Reed*, for the trustee. In substance, the whole interest in these houses belonged to the bankrupt for her separate use. She had a life estate coupled with an absolute power of disposal of the whole. The houses were therefore her separate property within the meaning of the Married Women's Property Act, 1882, s. 1, sub-s. 5. (1) See notes to *Hulme* v.

(1) The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. (5) :—

"Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole."

Sect. 19. "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the

Tenant. (1) The bankrupt ought, therefore, to be ordered to execute the deed of appointment in order to make the property available for the benefit of her creditors. Sect. 19 of the Married Women's Property Act, 1882, has not the effect of excepting from the operation of s. 1, sub-s. 5, all property included in a settlement. The object of that section was merely to make it clear that the provisions of the Act making property acquired by or coming to a married woman her separate property, and giving her an absolute power of disposal over such property, were not intended to interfere with or override the provisions of marriage settlements. The application of s. 1, sub-s. 5, to this property is not an interference with the provisions of this settlement in the sense contemplated by s. 19. This property is the separate property of the bankrupt by the terms of the settlement, quite independently of the provisions of the Act. The right of the trustee is not in derogation of but depends upon the affirmance of the provisions of the settlement.

Ribton, for the bankrupt. The terms of s. 19 of the Married Women's Property Act, 1882, are clear, and it expressly provides that nothing in the Act contained shall interfere with or affect any settlement respecting the property of any married woman. How can it be said that this settlement will not be affected, if the provisions of s. 1, sub-s. 5, are applied to the property comprised in it? By the terms of the settlement, if the married woman elects not to exercise the power of appointment, the property goes to her children. Her son has a vested interest under the settlement, though such interest is liable to be divested by an appointment. If the married woman can be forced, under the provisions of s. 1, sub-s. 5, to make an appointment, and the vested interest given by the settlement in default of appointment is thus destroyed, how can it be said that the settlement is not affected? Secondly, except so far as her life interest may be concerned, this property was not the separate property of the

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property of any married woman or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement or agreement for a settlement."

(1) 1 W. & T. Leading Cases, 5th ed. p. 536.

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bankrupt, and therefore not within s. 1, sub-s. 5. She had a power of disposal, but that is not included in the ordinary meaning of the term "property." That seems to be shewn by s. 44 of the Bankruptcy Act, 1883, which expressly provides that "property" shall include a power of disposal. He cited *In re Stonor's Trusts* (1); *Conolan* v. *Leyland* (2); *Turnbull* v. *Forman* (3); *Reid* v. *Reid* (4); *London Chartered Bank of Australia* v. *Lempriere.* (5)

Herbert Reed, in reply, cited *Bright's* Husband and Wife, p. 232; *Taylor* v. *Meads* (6); *Heatley* v. *Thomas* (7): *Mayd* v. *Field.* (8)

May 11. MANISTY, J. This is an appeal from the refusal of the county court judge to order the bankrupt to execute a conveyance of certain property to the trustee in bankruptcy. The effect of the settlement executed by the bankrupt upon her marriage is to give her a life interest in this property for her separate use without any restraint on anticipation, coupled with the absolute power to dispose of the property by deed during her lifetime or by will after her death. In substance, therefore, she has every power which the absolute owner of property possesses.

The question is whether under these circumstances the trustee in bankruptcy is entitled to the order for which he asks for the purpose of making this property available for the benefit of the bankrupt's creditors. It was argued in answer to the application of the trustee that the interest of the bankrupt was protected by the settlement from the bankrupt's creditors as not being property which under the provisions of the Married Women's Property Act, 1882, was rendered subject to the provisions of the bankruptcy law. I come to the conclusion that this argument cannot be supported. Sect. 1, sub-s. 5, of the Married Women's Property Act, 1882, provides that any married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a feme sole. The question raised is whether

(1) 24 Ch. D. 195.
(2) 27 Ch. D. 632.
(3) 15 Q. B. D. 234.
(4) 31 Ch. D. 402.
(5) Law Rep. 4 P. C. 572.
(6) 34 L. J. (Ch.) 203.
(7) 15 Ves. 596.
(8) 3 Ch. D. 587.

this interest of the bankrupt is "separate property" within the meaning of that section. It is necessary in order to decide that question to consider the other statutory provisions bearing on the subject as well as the general law with regard to a wife's separate estate. It is said that s. 19 of the Married Women's Property Act operates to prevent any interference under the provisions of s. 1, sub-s. 5, with the property because it is property comprised in a settlement. The words relied on are "nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman." There being no restriction on anticipation in this case the words which immediately follow in the section do not apply. The question is what is the meaning of this provision. It is contended for the trustee in bankruptcy that his application does not involve any interference with the settlement in the sense contemplated by the section; that, on the contrary, he seeks to affirm the settlement as giving the bankrupt this property for her separate use and so rendering it subject to the provisions of s. 1, sub-s. 5. I think that his contention is correct. It appears to me that it would, as he pointed out, be a great anomaly, if a married woman could carry on a separate trade, and could by reason of such trade be rendered subject to the bankruptcy laws, and, having the right to property under a settlement and the absolute power of disposing of it as she pleased, she could nevertheless refuse to apply such property for the benefit of her creditors on the ground that her power over it arose under a settlement. There do not appear to be any other sections in the Married Women's Property Act, 1882, bearing on the point. It is necessary next to consider the provisions of the Bankruptcy Act, 1883. It is provided by s. 152 that nothing in the Act shall affect the provisions of the Married Women's Property Act, 1882; but, if the construction which we place upon the provisions of that Act is correct, there is nothing inconsistent with it in the provisions to which I am about to refer. Sect. 44 enacts that the property of the bankrupt for the purposes of the Act shall comprise (1) all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before

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his discharge; (2) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice. By s. 24 it is provided that "every debtor shall," among other things, "execute such powers of attorney, conveyances, deeds and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules or be directed by the court, &c." There is therefore no doubt that the Court has power to require the bankrupt to execute any deed that may be reasonably necessary for the purpose of enabling the trustee to deal with the estate. There do not appear to be any other provisions of the Bankruptcy Act which it is material to consider for the purposes of this case.

These being the statutory provisions which are applicable, it becomes necessary to consider the general law with regard to what constitutes separate estate of a married woman. It was argued that, according to the general law on the subject, where property is settled on a married woman for life for her separate use, with a general power to her to appoint by way of remainder, any interest in such property beyond the life estate is not to be considered as the separate property of the wife. It has been decided that, where a settlement gives the life interest to the married woman to her separate use without restriction on anticipation, and gives to her a general power of appointment, but provides that in default of such appointment the property shall go to her representatives, the whole of the beneficial interest in the property is to be treated as given for the sole and separate use of the wife, and she has an absolute power of disposal over it. But it is said that this case differs, because the ultimate remainder in default of appointment is not to the representatives of the tenant for life, but to other persons. It does not seem to me that that circumstance makes any substantial difference. There is an absolute power of disposal which precedes and overrides such ultimate

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remainder, and it seems to me that the fundamental principle must be that, where the property is entirely at the disposal of the bankrupt, she must dispose of it for the benefit of her creditors. It is not necessary for me to go through all the cases on the subject. They will be found cited and the result of them summarized in Montague Lush's Law of Husband and Wife, pp. 125–127. A number of authorities are there referred to, of which perhaps the most important, as laying down most fully the general principles of equity with regard to a married woman's separate estate, is the decision of Lord Westbury in *Taylor* v. *Meads*. (1) It appears to me that the principle of this decision is applicable here. The present case is peculiar, because the settlement gives the bankrupt not only a general power of appointment by deed or will, but also a power to require the sale or mortgage of the property and the payment of the proceeds to herself. I come to the conclusion that under these circumstances the whole of the interest in this property was the separate property of the bankrupt within the meaning of s. 1, subs. 5, of the Married Women's Property Act, 1882, and that therefore the order applied for ought to have been made. For these reasons I think the appeal must be allowed.

CAVE, J. I am of the same opinion. The question depends on the construction of one or two sections of the Married Women's Property Act, 1882. The 5th sub-section of the 1st section of that Act provides that a married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a feme sole. The question, therefore, is whether the whole of the interest of the bankrupt in these houses is available for the benefit of her creditors, as being separate property within the meaning of the section. The county court judge held that this property, except so far as the life interest of the bankrupt was concerned, was not the separate property of the bankrupt. It is necessary, therefore, to consider the nature of the interest created by the settlement in this property. By the settlement the bankrupt was to enjoy the rents and profits of the houses

(1) 34 L. J. (Ch.) 203.

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during her life, without restriction on anticipation, and a general power of appointment by deed or will was given to her in respect of them, with a further provision that she might require a sale or mortgage of them during her life, and payment of the proceeds thereof to her. A more complete case of all that substantially constitutes ownership it is impossible to conceive. There is, it is true, a trust for the benefit of an existing child by a former husband, and any future children of the intended marriage, in the event of her not disposing of the property otherwise. The interest of such a child appears to me to be about as valuable as that of a legatee under a will in the lifetime of the testator. It would certainly be a monstrous thing if, the bankrupt having the right of enjoyment of this property during her life, coupled with an absolute power of disposing of the whole interest in it by deed or by will, it should be considered not to be her separate property for the purposes of bankruptcy. The learned judge of the county court says that it is not separate property of the wife in equity, but he quotes no authority for that proposition, and it is to my mind contrary to the authorities to which our attention has been called. I come to the conclusion that these houses are, to the extent of the entire interest in them, the separate property of the bankrupt, and consequently subject to the provisions of the bankruptcy law under s. 1, sub-s. 5, of the Married Women's Property Act, 1882, unless there is something in some other part of the Act to take them out of that provision. It seems to me clear, putting aside for a moment all question as to the effect of s. 19, that the bankrupt could contract with reference to her interest in and power to dispose of these houses under this settlement as separate property, and by such a contract the whole of her interest would be bound, and it could be made the subject of execution upon a judgment in an action on the contract. It would be a very anomalous result if the effect of enabling the married woman to be made bankrupt were to remove out of the reach of her creditors that property which otherwise would have been available for their benefit. The suggestion is that such is the effect of s. 19 of the Act; for, if this property is not available in bankruptcy for the benefit of the creditors, then upon the discharge of the bankrupt the effect would be to

destroy any right the creditors might have to have resort to this property.

The language of s. 19 is no doubt very wide indeed; but it must be remembered in construing it that the language of Acts of Parliament is not always precisely accurate, and that words themselves are often but an imperfect vehicle of thought. The words are undoubtedly capable, taken by themselves, of the meaning contended for: but they are also, in my opinion, capable of a narrower construction. The question is, which construction it is more reasonable to suppose the legislature intended, having regard to the subject-matter and the other provisions of the Act. I cannot myself entertain any doubt with regard to the real intention of the legislature. There appear to me to be so many difficulties attendant upon the construction contended for on behalf of the bankrupt, that I am obliged to consider whether the enactment cannot have another application than that which her counsel suggests. Take, for instance, the 3rd sub-section of s. 1 of the Act. That provides that every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn. That provision seems clearly to be intended to apply to her separate property, whether it arises under a settlement or not. But, if we are to adopt the contention for the bankrupt, in future in every action on a contract against a married woman this difficulty will occur: separate property not arising under a settlement must be deemed to be bound, but separate property arising under a settlement will not be bound, unless the parties can be shewn to have contracted specifically in reference thereto. Sect. 19 is not confined to existing settlements, but includes all settlements; consequently contracts made by married women in future would have to be placed in different categories, according as there was a settlement or not, and according as the contract was made with specific reference to separate property under such settlement or not. Take again the provisions of sub-s. 4 of s. 1. If the construction of s. 19 is as suggested, the same difficulty would arise with regard to the provisions of this sub-section, and the contract of a married woman would bind subsequently acquired separate property which did not arise

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under a settlement, but would not bind separate property which did. It would constantly be necessary, in order to ascertain the effect of a contract which a married woman might enter into, to determine whether there was separate property under a settlement or not. It seems to me that there would be such great inconveniences and evils attendant on such a result, that it cannot have been intended. The section goes on, after the words on which reliance has been placed, as follows:—"or shall interfere with or render inoperative any restrictions against alienation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument." I think that the expressions used shew that the interference contemplated was a direct interference by the Act itself with the provisions of a settlement, not an interference with the settled property through the medium of something which the woman may do or not as she pleases. This consideration appears to afford some guidance with regard to the meaning of the earlier words of the section. Looking at the other provisions of the Act to see whether there is anything in the Act to which the provisions of s. 19 can have an application other than that contended for on behalf of the bankrupt, I find it provided by s. 1, sub-s. 1, that a married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a feme sole without the intervention of any trustee; and then again, by s. 5, it is provided that every woman married before the commencement of the Act shall be entitled to have and to hold, and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of the Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid. It might have been supposed that without s. 19 those provisions gave a married woman an absolute power of disposing of separate property included in a settlement contrary to the terms of the settlement. It therefore seems to me that the words of s. 19 may have a reasonable construction other

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than that contended for by the bankrupt's counsel, and one which is free from the evils and difficulties which would result from that construction. I therefore come to the conclusion that this property is separate property within the meaning of the 5th sub-section, and that s. 19 does not prevent that sub-section from applying to it. That being so, s. 24 of the Bankruptcy Act, 1882, gives the amplest power to the Court of compelling the bankrupt to execute any conveyance of it which may be reasonably required. I think it is reasonable that the bankrupt should execute the conveyance in this case. It therefore follows that the county court judge ought to have made the order applied for, and that his decision must be reversed.

Appeal allowed.

Solicitors for the trustee: *J. A. & H. E. Farnfield.*
Solicitors for the bankrupt: *Woodbridge & Sons.*

E. L.

SEROKA AND WIFE *v.* KATTENBURG AND WIFE.

April 20.

Husband and Wife—Wrongs committed by Wife after her Marriage—Liability of Husband—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2.

The Married Women's Property Act, 1882, does not abolish the liability of a husband for his wife's wrongful acts, and the plaintiff may sue the husband and wife jointly or the wife alone for wrongs committed by her after the marriage.

ACTION for libel and slander of the female plaintiff by the female defendant. The cause of action arose after the passing of the Married Women's Property Act, 1882. (1)

The defendant Leman Kattenburg, the husband, who pleaded

(1) By s. 1, sub-s. 2, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), "a married woman shall be capable of . . . suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her . . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise."

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separately, raised in his defence an objection that the statement of claim disclosed no cause of action against him, inasmuch as it was not alleged that he spoke, wrote, published or caused to be spoken, written, or published the defamatory words, and that he was not liable for words spoken, written, or published by his wife or by her caused to be spoken, written, or published, and that he was not a necessary or proper party to the action.

The objection was heard by order as an opposed motion.

Herbert Reed, for the defendant. Before the Married Women's Property Act, 1882, a husband was properly joined as a co-defendant in an action for a tort committed by his wife, the sole reason being that, as all her personal property was vested during coverture in her husband, he must necessarily be joined for conformity: *Capel* v. *Powell* (1); *Wright* v. *Leonard*. (2) The effect of the Act of 1882 is to make the whole of a married woman's personal property her separate estate, and so to make her a feme sole for the purpose of suing and being sued. An action against husband and wife for the tort of the wife must have been concluded during their joint lives: *Wright* v. *Leonard* (3); but now husband and wife are for many legal purposes two distinct persons, and the effect is the same as though for those purposes the marriage had been dissolved. By the Act of 1882 the wife is made capable of being sued alone for her torts; the sole ground therefore of the husband's previous liability is removed.

[A. L. SMITH, J. Sects. 14 and 15 of the Act of 1882 contain a limitation of the husband's liability for his wife's torts committed before marriage; but there is no limitation to his liability for those committed by her during coverture.]

That is so; but a married woman may sue alone for a tort committed before the Act of 1882 came into operation: *Weldon* v. *Winslow* (4); and conversely she should be sued alone for her torts.

J. J. Sims, for plaintiffs. The words of the section are "need not be joined," and the Act was only intended to leave it optional

(1) 17 C. B. (N.S.) at p. 748.
(2) 11 C. B. (N.S.) at p. 266.
(3) 11 C. B. (N.S.) 258.
(4) 13 Q. B. D. 784.

with a plaintiff to sue the wife alone or to join the husband as a co-defendant. The reason that a husband was necessarily joined as a defendant in an action for torts committed by his wife was that a married woman could not alone commit a tort, she and her husband being one; her torts were torts of her husband: *Wainford* v. *Heyl.* (1) This Act does not abolish the old practice of joining the husband as a defendant, nor does it do away with the reason for joining him; there is nothing in it to relieve him of his common law liability for wrongs committed by his wife during coverture. The provision in s. 1, sub-s. 2 that "any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise," is only applicable to those cases where the plaintiff has elected to sue the wife alone.

Herbert Reed, in reply.

MATHEW, J. I am of opinion that the husband is liable to be joined as a defendant in this action. It is agreed that before the passing of the Married Women's Property Act of 1882, a husband must have been joined as defendant in an action brought against the wife for a tort committed by her; but it is said that that Act altered the law in this respect. Now, if this construction is right the statute in question is an Act for the relief of husbands, and not an Act affecting the property of married women. Why is this effect attributed to it? It is said that since the passing of the Act whatever the wife earns is her own property and is made a fund for the discharge of her liabilities, whether in tort or contract; and that therefore it is only fair that the husband should be discharged from his liability for the torts of his wife. But if we look at the terms of the Act it appears impossible to put such a construction upon it; sub-s. 2 of s. 1 is an enabling clause, and appears to give the option of suing the wife where she has separate property, and there is a chance of the plaintiff being able to enforce a judgment against her; while in cases where there would be no chance of enforcing judgment against the wife, the husband is left subject to his old common law liabilities. The words of the section are "need not be joined," but they do not discharge

(1) Law Rep. 20 Eq. 321.

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the husband from his old liability; they are intended to give to a plaintiff the option of suing husband and wife together or suing the wife alone; judgment may be entered against the wife and execution issued against her separate property, if she has any; but where she has none, the plaintiff is entitled to add the husband as a co-defendant.

A. L. SMITH, J. I am of the same opinion. The Act of 1882 is primarily an Act consolidating and amending the law relating to the property of married women. It contains two very remarkable sections, the 14th and 15th, in relief of the husband, but it has no section relieving him from liability for wrongs done by his wife after her marriage. This clearly shews that it is an Act in favour of the wife, and does not affect the liability of the husband except in those instances where there is a specific limitation in his favour.

Judgment for the plaintiffs.

Solicitor for the plaintiffs: *A. Benning.*
Solicitors for the defendants: *Goldberg & Langdon.*

W. J. B.

June 1.

WILLIAMS AND ANOTHER *v.* DE BOINVILLE AND ANOTHER.

Practice—Notice of Motion, Amendment of—Appeal from Chambers—Notice for Day not in the Sittings.

A notice of motion having been given for a day not in the sittings, the Court amended the notice in this respect.

APPEAL from an order of Field, J., at chambers, whereby he affirmed the decision of a master refusing to set aside a judgment which had been signed against the defendants.

The order was made on the 20th of April. The defendants in due time gave notice of motion appealing from such order "for Wednesday the 28th of April, or so soon thereafter as counsel could be heard," and the case was accordingly entered in the list of opposed motions. The 28th of April was a day which was not in any sittings of the Court, being the Wednesday after Easter.

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On the case coming on for hearing,

Upjohn, for the plaintiffs, took the preliminary objection that the notice of motion was bad, being given for a dies non.

He cited *Maullin* v. *Rogers* (1), and *Daubney* v. *Shuttleworth*. (2)

[MATHEW, J. The only object of the notice now is to give notice to the other side that the case will be inserted in the list. When it is inserted it comes on in its turn, and the day for which notice has been given is really of no moment. This being a mere slip in a matter of form, by which the plaintiffs cannot have been misled or prejudiced, ought we not to amend?]

According to *Daubney* v. *Shuttleworth* (2) there is no power to amend in such a case, the notice being void.

Asquith, and *Swinfen Eady*, for the defendants, were not called on to argue the preliminary point.

THE COURT (Manisty and Mathew, JJ.) were of opinion that the notice of motion should be amended by substituting for the 28th of April the day of the sittings for which the notice ought to have been given. The argument accordingly proceeded, and ultimately the appeal was dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *F. W. Boorman.*

Solicitors for defendants: *Bramall & White.*

(1) W. N. 1886, p. 104. (2) 1 Ex. D. 53.

E. L.

Explained. GEORGE *v.* TOMPSON'S TRUSTEE. [1949] 1 All E.R. 554.

Considered. GEORGE *v.* TOMPSON'S TRUSTEE. [1949] 1 Ch. 322

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Dec. 9, 16.

BUTLER *v.* WEARING.

Bankruptcy—Execution Creditor—Garnishee Order—Completion of Attachment —"Receipt of Debt," what is — Money paid into Court to abide further Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), s. 45.

A creditor having obtained a garnishee order in respect of a debt due to the judgment debtor, a third person intervened claiming that the debt was due to her; and the garnishee, under an order of the Court, paid the amount into court to abide further order A receiving order having been subsequently made against the judgment debtor, the third person withdrew her claim:—

Held, that there had been no "receipt of the debt," by the creditor within the meaning of s. 45 of the Bankruptcy Act, 1883, so as to entitle him to retain it against the judgment debtor's trustee in bankruptcy.

ISSUE tried by Manisty, J. The material facts proved or admitted at the trial were as follows:—

On the 15th of April, 1885, the defendant Wearing recovered judgment against Jackson for 71*l.* At the date of the judgment Nelson was indebted to Jackson in a sum of about 46*l.* Wearing having obtained, ex parte, the usual garnishee order against Nelson in respect of that debt, Jackson's wife intervened, as claimant, on the ground that Nelson's debt was due to her and not to her husband.

On the 22nd of April the Court made an order directing that the garnishee should within forty-eight hours pay the 46*l.* into court; that such payment should be a valid discharge to him as against the garnishor and the claimant, and all other parties, and that the sum so paid in should remain in court to abide further order. The order also directed that an issue should be tried, in which Mrs. Jackson should be plaintiff and Wearing defendant, to determine which of them was entitled to the 46*l.* Nelson duly paid the 46*l.* into court in compliance with the order. On the 5th of May, Jackson committed an act of bankruptcy. A petition was presented against him on the 6th of May; a receiving order was made on the 21st of May; on the 4th of June he was adjudicated bankrupt; and on the 15th of June the plaintiff Butler was appointed trustee in the bankruptcy. Subsequently, Mrs. Jackson admitted that she could not support her claim, and withdrew it, and the present issue was

directed to try whether the 46*l.* was the property of Butler, as Jackson's trustee in bankruptcy, or of the defendant Wearing.

Baldwin, for the trustee. The trustee is entitled to the 46*l.*, because there has been no "receipt of the debt" by the judgment creditor within the meaning of s. 45 of the Bankruptcy Act, 1883. (1) The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), did not contain any provisions similar to the provisions of s. 45. The decisions in *Lowe* v. *Blakemore* (2), and *Ex parte Joselyne, In re Watt* (3), established that a judgment creditor who had obtained a garnishee order nisi attaching debts due to the debtor was a secured creditor within the meaning of s. 16 of the Act of 1869, and therefore entitled to the attached debts as against the trustee in the liquidation, even though such debts did not become due until after the liquidation. But in *Ex parte Pillers, In re Curtoys* (4), the Court of Appeal held that there must be actual payment of the attached debt to the garnishee in order to bring him within the protection afforded to secured creditors under s. 95 of the Act of 1869. In *Ex parte Banner, In re Keyworth* (5), it was no doubt held that payment into court by the defendant in an action constitutes the plaintiff a secured creditor with respect to the subsequent liquidation of the defendant. But the object of s. 45 was to incorporate the decision in *Ex parte Pillers, In re Curtoys* (4), so as to abolish the security where the payment into court is in respect of a debt which has been attached by the judgment creditor. "Receipt of the debt" under s. 45 means actual receipt by the judgment creditor before the bankruptcy of the debtor. A constructive

(1) Sect. 45: "(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

"(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale: an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or in the case of an equitable interest, by the appointment of a receiver."

(2) Law Rep. 10 Q. B. 485.

(3) 8 Ch. D. 327.

(4) 17 Ch. D. 653.

(5) Law Rep. 9 Ch. 379.

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receipt, such as is relied on here, will not satisfy the words of that section. Further, there was not even a constructive receipt on the facts. The 46*l.* could not have been obtained by either party without the order of the Court, and when it was paid in neither party could have treated it as money paid to his or her use.

He also referred to *Slater* v. *Pinder* (1), and *Ex parte Halling, In re Haydon.* (2)

Shee, for the execution creditor. The case of a debt attached by a judgment creditor is intended to be placed on the same footing as the other cases dealt with in s. 45, viz., where goods are seized in execution, or an execution issues against land. In the latter cases the judgment creditor is protected, though the interposition of an officer of the Court is necessary before he can receive the benefit of the execution. There is no good reason why he should not equally be protected where the order of the Court is necessary before he can receive the amount paid into court in respect of an attached debt. A garnishee order is in its nature analogous to seizure and sale of goods on an execution: *Emanuel* v. *Bridger* (3): *Ex parte Joselyne, In re Watt.* (4) Here the payment into court was merely to abide the issue between Mrs. Jackson and the judgment creditor. When that issue was decided by Mrs. Jackson withdrawing her claim the title of the judgment creditor to the money must be taken to have related back to the time of payment into Court, and the money must be taken to have been paid to his use at that time.

He also referred to *Ex parte Bouchard, In re Moojen* (5), and *Tayler* v. *Marling.* (6)

Baldwin, replied.

Cur. adv. vult.

Dec. 16. 1885. MANISTY, J. This was an interpleader issue, and the question raised was whether the plaintiff, as trustee in bankruptcy of Jackson's estate, or the defendant, a judgment creditor of Jackson, was entitled to the sum of 46*l.* which had

(1) Law Rep. 6 Ex. 228.
(2) 7 Ch. D. 157.
(3) Law Rep. 9 Q. B. 286.
(4) 8 Ch. D. 327.
(5) 12 Ch. D. 26.
(6) 2 M. & G. 55.

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been paid into Court under the following circumstances:—[The learned judge stated the facts.] The question is a new one, turning upon the true construction of s. 45 of the Bankruptcy Act, 1883; but before I deal with that Act, I will shortly refer to the state of the law at the time it was passed. Prior to the Act of 1869 there existed a provision which deprived execution creditors of the benefit of their execution if they had not realised by seizure and sale of the debtor's goods before the adjudication. The Act of 1869 did not contain that provision, but it contained provisions with respect to the rights of creditors who held security for their debts, and questions then arose as to who were secured creditors, both with respect to executions against goods and with respect to garnishee orders. As regarded executions against goods it was held that if a creditor had seized but not sold, he was a creditor holding security, though I believe there was an exception if the debtor was a trader and the execution was for a debt exceeding 50*l*. As regarded garnishee orders the decisions seem to me to have been conflicting. I think that the decision in *Ex parte Joselyne, In re Watt* (1), is difficult to reconcile with the subsequent decision in *Ex parte Pillers, In re Curtoys* (2), where the Court of Appeal held that the garnishor was not entitled to the protection of s. 95, sub-s. 3, of the Act of 1869 unless he had obtained actual payment of the attached debt before the order of adjudication. If it were necessary for me to decide the question, I think I should adopt the statement of the law which is given by Lush, L.J., in that case. He says:—"The intention was that so long as the execution remained only a security for the debt, it was not to be protected. Something more must have been done; there must have been an actual conversion of the security into money. And I think we must find some equivalent for that in the case of an attachment under a garnishee order. What is the equivalent? The security must have been realized before there can be any protection. How can the garnishor realize the debt which he has attached? The debt cannot be sold, and he can only realize it by obtaining payment of it from the garnishee, either voluntarily

(1) 8 Ch. D. 327. (2) 17 Ch. D. 653.

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or by means of an execution upon his goods. Till that has been done I think there is no protection. It is true the words "executed by seizure and sale" have no application. But I think they do shew what was the meaning of the legislature clearly enough to enable us to apply the principle, and if, for want of apt words in the section, we were to say it does not apply to a garnishee order, we should be incurring the censure which is implied in the maxim, 'qui hæret in literâ hæret in cortice.' I am of opinion that the only equivalent for an actual sale of goods which will satisfy the words of the Act in the case of a garnishee order is an actual receipt of the attached debt by the garnishor. Till that has been done the attachment is only a security, and it is not protected by s. 95."

Now that being the view which, were it necessary, I should be prepared to adopt, I come to the consideration of the Bankruptcy Act of 1883. Sect. 45, in effect, enacts that where a creditor has attached any debt due to him, he shall not be entitled to retain the benefit of the attachment against the trustee in bankruptcy of the debtor unless he has completed the attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition. Sub-s. 2 defines what is meant by "completing an attachment." For the purpose of the Act "an attachment of a debt is completed by receipt of the debt." The question is what is meant by the words "receipt of the debt?" Is it, as Lush, L.J., said in *Ex parte Pillers, In re Curtoys* (1), an actual receipt by the garnishor, or will some kind of constructive receipt, as when the money is paid into Court subject to further order, satisfy those words? It was argued that where the money was paid into Court, and the garnishee thereby discharged, there was a receipt by that one of the two contending parties in the interpleader issue who ultimately received the money. It was said that the judgment creditor here, having ultimately been proved to be entitled to the money, must be taken, by relation back, as it were, to have received the debt within the meaning of the Act at the time when the money was paid into Court. I have come to the conclusion that that is not the mean-

(1) 17 Ch. D. 653.

ing of the Act. The Act means what it says, that the attachment must be completed by *receipt* of the debt. I think that the doctrine of title by relation cannot be applied. The intention of the legislature was to get rid of all the questions which might have arisen before the Act was passed, and to put the law upon a very simple and plain foundation. A judgment creditor having attached a debt does not become entitled to retain it unless he has received the debt before the bankruptcy of the debtor. I am therefore of opinion that in this case the trustee is entitled to judgment.

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Judgment for the plaintiff.

Solicitors for plaintiff: *Baileys, Shaw, & Gillett.*
Solicitor for defendant: *M. J. A. Dickinson.*

W. A.

HOWE *v.* MARK FINCH & CO.

1885 *April* 5.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), s. 1, *sub-s.* 1—*Defect in "Works"—Wall in course of Construction—Not "used in or connected with the business of the employer."*

In the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1—defining the liability of employers for personal injury caused to their workmen (1) "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer"—the expression "works" must be taken to mean works already completed and not works in course of construction which are, on completion, to be connected with or used in the business of the employer.

APPEAL from the Bow County Court of Middlesex.

The action was under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and it appeared from the notes of the county court judge that the plaintiff's claim was for 468*l.*, for injuries caused to him while in the defendants' service by the fall of a wall forming part of the defendants' works; the wall being in a defective condition owing to the defendants' negligence.

The plaintiff was a plumber employed by the defendants on their chemical works. While so employed a new wall, alleged to

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be imperfectly built for their works by the defendants, fell upon the plaintiff and injured him. It was an external warehouse wall. Part of the warehouse is now an engine-room used for the works and used as storage for ballast. At the time of the accident the wall had not been completed, and had never been used, though it was intended to be used for the business. The warehouse itself was not in use at the time of the accident, and no engine was there.

The county court judge ruled that the wall was not "works" within the meaning of that word in sub-s. 1 of s. 1 of the Employers' Liability Act, 1880, and nonsuited the plaintiff.

H. J. Brown, for the plaintiff, moved to set aside the nonsuit. There was a defect in the condition of the "works" within s. 1, sub-s. 1 of the Act. The expression "works" must be taken to include a factory. The premises themselves were called chemical "works," and the external wall was part of such "works." It could not be said that if from careless construction of outer walls the whole building fell that the employer would not be responsible. The word "works" in sub-s. 1 would be unnecessary unless it applied to the structure, for all sources of danger inside it, viz., "ways," "machinery," and "plant" are expressly specified. The wall, although incomplete, was part of the "works connected with," even if not "used in the business of the employer" under sub-s. 1.

Crump, Q.C. (*Ridley*, with him), for the defendants. The case is not within 43 & 44 Vict. c. 42, s. 1, which was meant to apply to works in use and to a business actually carried on. The wall was at a future time to become part of the "works," and to be "connected with or used in the business," but was not part of the works at the time of the accident. The terms of the Act throughout shew that it is directed against negligence in the management of a going concern. If the wall was negligently built the plaintiff can bring his action at common law against his master irrespective of the statute, and the county court judge has reserved leave to bring such action.

MATHEW, J. This nonsuit must be upheld. We are constrained to come to the conclusion that the legislature in saying,

"defects in the condition of the . . . works . . . connected with or used in the business of the employer," did not mean "*about* to be" connected, or "*about* to be" used. I think the defect that it was intended to protect the workman against was a defect in "the works connected with or used in the business of the employer, carried on by himself," a defect which the employer might or ought to discover, and the workman ought to have an opportunity of objecting to.

I do not think s. 1, subs. 1, was intended to apply to a case where machinery, &c., was brought into a place intended to be used, and left so insecure that it fell. This is made somewhat clearer by the terms of sub-s. 2, and there is a further proviso in s. 2, that the workman shall not be entitled to a remedy under s. 1, sub-s. 1, "unless the defect therein mentioned arises from the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the . . . works . . . were in proper condition." There, I think, the person is to be a person entrusted with superintendence of works, &c., "used in the business," to go back to the language of sub-s. 1. This damage by the fall of a wall in course of erection cannot be spoken of as arising from a defect "in works" actually occupied, or actually used for the purpose of business. We are now assuming negligence in the defendants, and for that there is a clear liability at common law. But with respect to the liability under the Act the county court judge was right.

A. L. SMITH, J. The only material fact for us is the condition of this wall at the time it fell. On the evidence it appears that it was then being built to form thereafter part of the side of a warehouse, and had not been used. Then the question is, assuming the wall defective, was the defect in the condition of the works "connected with or used in the business of the employer" within s. 1, sub-s. 1, of the Employers' Liability Act, 1880? I will repeat the opinion I have enunciated before. Take the first sub-sections (not the 4th or 5th) of s. 1, and the Act says in effect that if the workman after this Act sues his master for damage caused by reason (sub-s. 1) of any defect in the condition of the

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ways, works, &c., or (sub-s. 2), of negligence of a person in superintendence, or (sub-s. 3) of negligence of a person in the service of the employer to whose orders or directions the workman was bound to conform,—under those circumstances the workman shall be in the same position as if the special defences which would otherwise arise were taken away, because he shall have the same remedy as if he were not a servant engaged in his work. Then, those defences being taken away from the master, the workman must bring himself within one of those sub-sections. The only sub-section the plaintiff can attempt to bring himself within is sub-s. 1, and to do so he must shew a "defect in the condition of the ways, works, &c., connected with or used in the business of the employer." Does that mean partly made ways, &c., which may be very insecure when in process of construction? No. It means to give him a right of action when the contemplated ways, works, &c., are "connected with or used in the business," and are in a defective state by reason of the master not having discovered what he ought to have done. "Ways" means the ways used in the business, not partly made ways not used. If that be so as to "ways," it is so as to "works." I do not agree that if a whole structure fell or caused damage to a workman he would not have a right of action, for I think that he would. But here it was partly finished. I think "ways, works," &c., mean the existing and completed works. I cannot read the words in any other manner. The county court judge was right.

Solicitor for plaintiff: *Fred. Eastwood.*

Solicitors for defendants: *Ingram, Harrison, & Ingram.*

J. R.

THE QUEEN ON THE PROSECUTION OF RICHARD FOX *v.* A JUSTICE FOR THE CINQUE PORTS.

1886
April 5.

Vaccination—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Summons—Default of Appearance of Parent—Power to make Vaccination Order.*

By the Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 31, upon an information that a notice to the parent of a child to procure its being vaccinated has been disregarded, a justice may summon such parent to appear with the child before him, and "upon the appearance" the justice may make an order directing such child to be vaccinated. By s. 33, the 11 & 12 Vict. c. 43 (Jervis's Act), except s. 11 thereof, shall apply to all proceedings to be taken under the Act:—

Held, that an order for the vaccination of a child may be made under s. 31 of the Vaccination Act, 1867, on a parent duly summoned even when he has failed to appear upon the summons.

RULE calling upon a justice for the Cinque Ports to shew cause why a writ of certiorari should not issue to remove into the Queen's Bench Division an order directing that Richard Fox should, pursuant to s. 31 of the Vaccination Act, 1867, cause his child, Olive Faith Fox, to be vaccinated within twenty-eight days from the date of the order, on the ground that the same was made without jurisdiction.

The order recited that a vaccination officer gave information in writing to the justice that the officer had reason to believe that Olive Faith Fox, a child under the age of fourteen years, to wit, of the age of nine months and twenty-one days, had not been successfully vaccinated, and that he had given notice to Richard Fox, being the parent having the custody of the child, to procure its being vaccinated, and that such notice had been disregarded, contrary to the form of the Vaccination Acts, 1867 and 1871; and that Richard Fox having been duly summoned had not appeared with the child before the justice on this 18th of November, 1885; and the justice having found, after such examination as he deemed necessary, that the child had not been vaccinated, nor had already had the small-pox, did thereby, pursuant to s. 31 of the Vaccination Act of 1867, direct Richard Fox to cause the child to be vaccinated within twenty-eight days from the date of the order, which bore date the 18th of November, 1885.

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Crump, Q.C., shewed cause. The justice had jurisdiction to make the order in default of appearance by the parent who had been duly summoned. By 30 & 31 Vict. c. 84, s. 31, on such an information as was given in this case, "the justice may summon such parent to appear with the child before him at a certain time and place, and upon the appearance . . . . he may, if he see fit, make an order . . . . directing such child to be vaccinated within a certain time." . . . . By s. 33, the statute 11 & 12 Vict. c. 43 (Jervis's Act), except s. 11, shall apply to all proceedings taken under the Vaccination Act, 30 & 31 Vict. c. 84. By s. 13 of Jervis's Act, on default of appearance to a summons duly served, the justice may proceed to hear and determine the case in the absence of the defendant, or may issue a warrant. In the present case the provisions of the two Acts have been duly complied with. It has been held on the construction of s. 31 of the Vaccination Act, 1867, that it is not necessary to bring the child: *Dutton* v. *Atkins* (1). Unless the justice could make the order in default of appearance the parent might defeat the Act by disobeying the summons.

Dickens, in support of the rule. The words "upon the appearance" in s. 31 of the Vaccination Act, 1867, must not be disregarded. A parent may have good cause—such as the illness of the child—to shew for not having had it vaccinated. Although the presence of the child has been held not to be a condition precedent, yet the Court in *Dutton* v. *Atkins* (1) did not decide that the appearance of the parent was unnecessary, and the observations of Blackburn, J., rather tend to shew that the parent must appear. There is no provision in the first part of s. 31, that on non-appearance the justice may proceed "summarily," whereas in the latter part of the section, when an order under it has been disobeyed the "person upon whom such order shall have been made shall be proceeded against summarily." The same phrase is used in s. 29, and s. 13 of Jervis's Act relates to sections of the Act which do not apply to this case. What "such complaint or information" mentioned in s. 13 is, must be ascertained by reference to the earlier sections, and s. 1 refers to an information of an offence punishable upon summary conviction, which the

(1) Law Rep. 6 Q. B. 373.

present information is not. Nor is it a complaint upon which the justice has authority by law to make "any order for the payment of money or otherwise," for this is an information, and must, by s. 31 of the Vaccination Act, 1867, be "in writing." That the legislature intended the justice to have the means of exercising his discretion before making an order for compulsory vaccination appears from the Amendment Act of 1871 (34 & 35 Vict. c. 98), s. 11, which renders a parent failing to produce his child when required to do so by any summons under the principal Act liable on summary conviction to a penalty not exceeding 20*s*.

MATHEW, J. The rule must be discharged. I have no doubt the justice had jurisdiction to make the order. The question arises on s. 31 of the Act, and it is contended that the case is not within that section because, although summoned, the defendant failed to appear, and that his actual appearance was a condition precedent to the justice's jurisdiction. The section contains the words "upon the appearance," and it is said that this means that *unless* the parent appeared the justice would not be in a position to make the order, and that no harm would be done, because there was another section by which the parent could be compelled to appear. On that Act we have the remarkable decision in the case of *Dutton* v. *Atkins* (1), where the father appeared without the child, and the justices thought they had no jurisdiction, but the case was sent back to them, and in my view, notwithstanding the observations of Mellor, J., the Court thought the appearance of the father was not a condition precedent. I think "the appearance" in s. 31 was meant to be "appearance of the child"; but the Court held that not to be necessary, and we must accept that decision as correct and binding on us. I think the object of the section was not appearance, but to direct the justices what they were to do if the parent appeared with the child. And there was good reason for that, because, on the appearance of the child the Act empowers the justices to examine the child, which they otherwise would not have power to do. "If the parent shall appear." But what if he does not? I think the legislature provides for the case, for it incorporates all the sections of Jervis's

(1) Law Rep. 6 Q. B. 373.

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Act, except s. 11. That renders s. 31 perfectly intelligible, for we must read into it the provisions of Jervis's Act, which point out what is to happen if the defendant does not appear. Reading that Act into the Vaccination Act, and interpreting the two Acts together, Jervis's Act applies to s. 31.

It was also said that the word "complaint" having been used instead of "information in writing," as in s. 31, s. 31 must stand by itself, and not incorporate Jervis's Act. But when the Vaccination Act by s. 33 declares that 11 & 12 Vict. c. 43, shall apply, I see no such inconsistency as should affect the construction of s. 31, obvious in other respects.

A. L. SMITH, J. I am of the same opinion and for the same reasons. If Jervis's Act were *not* incorporated with 30 & 31 Vict. c. 84, what would be done if a person summoned wilfully abstained from appearing? It is said that the parent could be fined 20*s.* under s. 29. But that was not what was intended. The legislature intended that a child should not be going about unvaccinated so as to catch the smallpox and become a pest to its neighbours. An obstinate parent would, if the construction suggested were right, only have to stay away when summoned, and the justices could do nothing but direct proceedings under s. 29, and fine him 20*s.*

Rule discharged.

Solicitors for prosecutor: *Kingsford, Dorman, & Co.*
Solicitors for respondent: *Kingsford, Dorman, & Co.*

J. R.

[IN THE COURT OF APPEAL.]

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May 23.

HAMILTON, FRASER & Co. *v.* THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED.

Insurance (Marine)—General Words—Perils insured against—Splitting of Air Chamber of Donkey Engine.

A steamer was insured by a policy in the ordinary form on the ship and her machinery, including the donkey engine. The donkey engine was employed in the ordinary course of navigation in pumping water into the boilers, and in consequence of a screw valve which should have been open being, either by negligence or by accident, closed, the water was forced into the air chamber of the donkey engine which was split open:—

Held, by Lindley and Lopes, L.JJ. (Lord Esher, M.R., dissenting), that the injury was a peril insured against under the general words of the policy.

SPECIAL CASE, from which the following facts are taken.

The plaintiffs, who were the owners of the *Inchmaree*, a steam vessel, effected with the defendants a valued time policy of marine insurance on the ship, and on the machinery, shafting, propeller, boilers, and all connections, including donkey engine, and boilers, pumps, and all connections, the ship and the machinery being separately valued. The adventures and perils which the capital stock and funds of the defendant company were made liable to by the policy were, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment or damage of the aforesaid subject matter of insurance or any part thereof.

During the continuance of the policy, the *Inchmaree* was at anchor awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers by means of the donkey pump and engine in the usual way. At the time of effecting the insurance the donkey pump and engine, and all pipes, valves, and machinery connected therewith, were efficient and in good condition, and they worked satisfactorily up to the time of the

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occurrence hereinafter mentioned, and the engineers and the men working under them were capable and efficient for their duties. A pipe led from the donkey pump to the boilers, and at its junction with one of the boilers there was a check valve capable of being opened or closed by a screw. This valve should be open and clear when the boilers are being pumped up, but at the time of the accident it was either closed or salted up, so that water could not pass into the boiler. The consequence was, that when the donkey pump was set to work the pipes and water chamber in the donkey pump became overcharged, and the water was forced up into the air chamber, which in consequence split, and the pump was thereby damaged. It was admitted for the purposes of the case, either that the check valve was allowed to remain closed or become salted up by the negligence of one of the engineers, or that it was accidentally salted up without being noticed, though reasonable care was taken by the engineers, but the parties were unable to agree which of these events had happened. The plaintiffs contended that the defendants were liable, whether there was negligence or not, and it was agreed to leave that question for trial (if material) after the decision of this case. It was admitted that the closing or salting up and the accident were not due to ordinary wear and tear.

The question for the opinion of the Court was whether the defendants were liable under the policy in respect of the loss, (1), if it could have been avoided by proper care, and occurred through negligence; (2), if it occurred accidentally without negligence.

The case came before a Divisional Court, consisting of Mathew and A. L. Smith, JJ., who gave judgment for the plaintiffs on the authority of *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (1)

The defendants appealed.

April 19, 1886. *Sir C. Russell, A.G.*, and *Sir R. E. Webster, Q.C.* (*French, Q.C.*, and *Synnott*, with them), for the defendants. The decision in this case depends upon the view taken by the Court of the principle upon which *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (1) was decided. The defend-

(1) 6 Q. B. D. 51.

ants have been held liable under the general words of the policy of insurance; but there has been no explosion, there has been no loss by a peril of the seas. The loss which has happened does not resemble any of the perils enumerated. In *Davidson* v. *Burnand* (1) it was held that damage to a cargo through the influx of salt-water was a peril covered by the policy; but in that case the damage appeared to have arisen from an accidental cause. In 3 Kent's Com., part 5, lect. 47, p. 216 [12th ed.], it is said that "perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence." The express words of the policy are not to be extended beyond their proper meaning: *Spence* v. *Chodwick* (2); *Taylor* v. *Dunbar*. (3) The breaking of an engine from mere internal defects or mismanagement, cannot be a loss insured against: *Citizens Insurance Co.* v. *Glasgow*. (4) It is true that underwriters are liable for a peril of the sea, although that peril is brought about by the negligent act of the master and crew: *Dixon* v. *Sadler* (5); but in this case there has been no loss by a peril insured against: *Paterson* v. *Harris*. (6) No case is to be found in which an accident happening on board the ship during the insured voyage has been held to be a loss by peril of the seas.

Cohen, Q.C., Myburgh, Q.C. (*J. Gorell Barnes*, with them), for the plaintiffs. The general words of the policy cover this loss. In *Devaux* v. *J'Anson* (7) the ship was damaged in a dry dock, yet the damage was held to come within the general words. The rule is, that every loss incidental to the proper navigation of the vessel is ejusdem generis with perils of the sea: *Davidson* v. *Burnand* (1); *Good* v. *London Steam-Ship Owners Association*. (8) From this point of view the case cannot be distinguished from *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (9) Substituting steam for wind as a motive power, the cause of the damage is similar to the cause of loss in every case of negligent or improper navigation of a sailing vessel, for the peril arose from

(1) Law Rep. 4 C. P. 117.
(2) 10 Q. B. 517.
(3) Law Rep. 4 C. P. 206.
(4) 9 Missouri State Reports, 407.
(5) 5 M. & W. 405.
(6) 1 B. & S. 336.
(7) 5 Bing. N. C. 519.
(8) Law Rep. 6 C. P. 563.
(9) 6 Q. B. D. 51.

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the use of the steam machinery in the ordinary course of navigation.

Synnott, in reply. It is a mistake to suggest that the reason why damage by wind and waves is within the policy is, because they are the motive power, the reason of liability is, that the policy expresses it. The expression "perils of the sea" cannot be taken as equivalent to "perils of navigation," there is no analogy between a peril by steam and a peril of the sea.

1886. May 23. LORD ESHER, M.R. I have the misfortune, I understand, of differing from my Brethren on the question of insurance law raised in this case.

There was an insurance on the ship and machinery separately insured, the policy being in the form of that in the case of *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (1) An injury has happened to part of the machinery, and it has been held that the plaintiffs are entitled to recover on the ground that there was a loss within the terms of the policy. It appears that there was a donkey engine, one employment of which was to work a donkey pump, to pump water from the sea, or otherwise, into the boiler. Now the donkey engine was working the donkey pump, water was taken up into the water chamber of the pump, and by reason of a valve being stopped (whether by accident or by negligence is wholly immaterial) the pressure of the water upon the air chamber split it. Nothing happened to the donkey engine, there was no escape of steam, there was nothing but the pressure of the cold water splitting the air chamber, and that is the only damage done.

The question is, whether that is a loss which can be brought within the terms of the policy. Now the policy is very much in the ordinary form, it has specially enumerated perils, the first of which is "perils of the sea;" it has a great many other enumerated perils, and then it has the ordinary general clause as to other perils. Now what is the true construction of such a policy in England? It seems to me that the rule of construction has been laid down and acknowledged and admitted to be clear law from the time of Lord Ellenborough downwards. Lord Ellenborough

(1) 6 Q. B. D. 51.

construed the term "perils of the sea," and held that those words do not include in an English policy all accidents which may happen on the sea to the ship, or all accidents which may happen in the course of the navigation, but are confined to perils which are caused by more than usual force of the sea, or the wind, or the elements, acting upon the ship. That is "perils of the sea;" and an accident to a ship, or goods, by "perils of the sea" must be the immediate result of some action of the elements. In order to cover other perils other words were added to the policy from time to time, and always at the end there was the larger clause. The next rule of construction which was laid down by Lord Ellenborough was that those general words cannot be construed as if they stood alone, that they only include accidents, not precisely and exactly described by the particular words, but accidents of the same kind as one or other of those enumerated. That being so, the only question is whether, as a matter of fact, anybody can say that this accident is of the same kind as any of the accidents specifically mentioned in the policy.

Now in the case of *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (1), the accident seems to me to have been materially different. The accident there was that the steam in the boilers burst them, and so the steam escaped into the ship, blew up the deck, and wrecked the ship. There, with considerable difficulty, I came to the conclusion that an explosion of steam getting into the ship and destroying the ship was sufficiently like the effects of fire upon a ship—and fire was one of the terms of the policy—to bring the case within the general words. I am perfectly willing to say, that in coming to that conclusion of fact I went to the verge of imagination. I should not be surprised, on the contrary, I think I should willingly acquiesce, if that view of that case were overruled. But this is no more like an explosion to my mind than if you were to kick a hole in the boiler. Here there is nothing but the force of the water pumped in, and, there being no escape, bursting the chamber, and the injury to the chamber is just the same as if it were broken from the outside. The water might have been forced into the chamber without any steam being used at all; by a pump used

(1) 6 Q. B. D. 51.

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with a handle, or a wheel, or somehow by hand labour, and it would have had precisely the same effect. How that can, within the reasonable imagination of anybody, be likened to an accident happening to a ship by reason of the elements, I cannot see. It seems to me to be wholly unlike the "perils of the sea" as hitherto construed. If you construed the words "perils of the sea" to include any accident which may happen to a ship in the ordinary course of navigation, of course this case is within those terms, but so to construe those words is to construe them in a way which has been over and over again overruled.

Then it was argued that the general words cover all losses incident to the navigation of a vessel during the voyage. If that be true then it seems to me that all the preceding words in the policy might as well be struck out as of no effect. I cannot accede to that view. Then it is said that the general words cover all losses incident to the navigation of the vessel during the voyage, because all losses incident to the navigation of the vessel during the voyage are of the same kind as losses by "perils of the sea." It seems to me that this is to break away from the recognised, decided meaning of the words "perils of the sea."

For these reasons, I cannot agree in this case, which to my mind goes much further than the case of *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (1), that there was a loss within any of the terms of the policy. In my opinion, therefore, that case does not cover the present, and the assured have suffered a loss which is not within the policy.

I will say one word as to what the Court are being enticed into doing. It is well known that the underwriters and the assured are neither of them willing to alter the words of the policy, and they, doubting whether the words will cover any particular case, try to entice the Court into altering the interpretation of the words of the policy by altering the rules of construction, which are as applicable to a policy of insurance as to every other contract. I decline to go one step in that direction. If parties want to cover new losses, it is their business to find the words which are to cover them, and they have no right to try to draw the Courts into

(1) 6 Q. B. D. 51.

a process of interpretation which has been ignored and declined as long as I can recollect anything about the law.

LINDLEY, J. I have the misfortune to differ from the Master of the Rolls in the view he takes of this case, and as my view and that of Lord Justice Lopes are alike he will read the judgment of us both.

LOPES, L.J. This action was brought by the plaintiffs to recover from the defendants a sum of 61. 5s. for a loss under a policy upon the steamship *Inchmaree*. The facts are set out in a special case.

In consequence of undue pressure of air and water the chamber of the donkey engine burst. This donkey engine at the time was being used for the purposes of the voyage and in the ordinary course of navigation. The question is whether the bursting of the donkey engine was a peril insured against by the policy?

We are unable to distinguish this case from that of *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (1) In that case it was held that the explosion of the boiler of a steamer was a peril insured against by a marine policy similar in form to the policy in this case. The facts in that case are very like the facts here. The ship was lying in port, and her master, having received orders to proceed to sea, weighed anchor. After making some fifteen revolutions the engine was stopped to allow of the vessel's head canting round, and within a few minutes of the engine being so stopped the port boiler burst, gutting the middle of the ship and blowing up her decks. Upon examination it was found that the bursting was due to the reduction of the shell of the boiler, and that such reduction was due chiefly to the action of bilge-water upon its external surface, and to the accumulation of sediment in the inside. Lord Selborne and Cockburn, C.J., held that the explosion was a peril within the general words with which the specification of the risks insured against concludes: "And all other perils, losses, and misfortunes that have or shall come to the subject-matter of this insurance." The present Master

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of the Rolls came to the same conclusion but not by the same process of reasoning. The ground of his decision was that "fire" being one of the enumerated perils, explosion was so much ejusdem generis with fire as to come within the general words. He says "unless the word 'fire' had been one of the particular terms in this policy, I could not have seen that the loss by explosion was like any of the other perils which are enumerated." We entirely agree with the judgment of Lord Selborne and Cockburn, C.J., but we venture to doubt if the Master of the Rolls is right in attaching so much importance to the mention of "fire" in the enumerated perils. We are of opinion if that word had been omitted the explosion would have been within the general words. On principle and on authority the judgment of Lord Selborne and Cockburn, C.J., seems right.

We assume that the bursting of the chamber of the donkey engine is not a "peril of the sea," and that it is not within the meaning of any other of the enumerated perils, but the question is whether it is covered by the concluding words: "all the perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of insurance or any part thereof."

It is material to consider what is the true construction to be placed on these general words. In *Cullen* v. *Butler* (1) the vessel was lost by being fired into through mistake. It was held that the loss was covered by the general clause. Lord Ellenborough, C.J., said: "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument, and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."

(1) 5 M. & S. 461.

In *Phillips* v. *Barber* (1) damage done to a vessel in a graving dock for repairs, by being blown over by the wind, was held within this general clause, and damage by the explosion of the boiler in *Perrin* v. *Protector Insurance Co.* (2), so also injury sustained by the accidental breaking or giving way of the tackle and supports, whereby the vessel was supported, in being moved from a dock where she had been hauled up for repairs: *Devaux* v. *J'Anson.* (3)

Surely, if the cases above cited come within the general clause, it would be unreasonable to hold that a bursting of a part of the machinery connected with the motive power necessary for the navigation of the vessel was not covered. Lord Selborne said in *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (4): "What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure on the boiler, or from defect of safety valves, or from neglect or mismanagement, making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of winds and defects or mismanagement of a ship's sails or tackle." Every word quoted is applicable to this case. We have no hesitation in holding that the bursting of the chamber of the donkey engine used for the purposes of the voyage in the ordinary course of navigating the ship is ejusdem generis with a peril of the sea and a loss covered by the general clause.

If the ship had been a sailing ship, and a spar, when she was getting under sail in port, had fallen on the deck and had been broken, surely it would have been a loss within the policy. We are unable to distinguish that case from the present.

We do not think that the general words include all losses that may happen during a voyage by accident, but we think the general words cover all losses incident to the navigation of a vessel during the voyage, inclusive of losses arising from negligence or improper management, because they are ejusdem generis with perils of the sea.

(1) 5 B. & A. 161.
(2) 11 Ohio State Reports, 147.
(3) 5 Bing. N. C. 519.
(4) 6 Q. B. D. 51.

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In our opinion the judgment of the Court below was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *T. W. Rossiter, for Hoyle, Shipley, & Hoyle, Newcastle-on-Tyne.*

Solicitors for defendants: *Gregory, Rowcliffes, & Co., for Hill, Dickinson, & Co., Liverpool.*

A. M.

June 1, 2.

HUGHES *v.* LITTLE.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8—*Consideration, Statement of—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule—Bill of Sale given by way of Indemnity to a Surety.*

By a bill of sale expressed to be given in consideration of the grantee thereof having at the request of the grantor become guarantee, and signed a promissory note for the payment of a sum of 45*l.* by the grantor, of which 32*l.*, or thereabouts, was then owing, the grantor assigned to the grantee certain chattels, described in a schedule, by way of security for any moneys which the grantee might be called upon to pay in respect of such guarantee, and interest thereon at the rate of 5*l.* per cent. per annum, and the grantor agreed that he would pay to the grantee any sums as aforesaid, together with interest then due, by monthly payments of 2*l.* on the first of every month. It being contended that the bill of sale was void on the ground that the consideration for which it was given was not sufficiently stated to satisfy the requirements of the 8th section of the Bills of Sale Act, 1878, and that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882:—

Held, that the bill of sale was good.

APPEAL from the judgment of the judge of the county court of Lancaster, upon an interpleader issue transferred under s. 17 of the Judicature Act, 1884 (47 & 48 Vict. c. 61).

The facts were as follows:

The plaintiff in the issue claimed certain goods, which had been taken in execution, under a bill of sale given by the execution debtor.

The contention for the defendant, the execution creditor, was that the bill of sale was void because the consideration for the same was not sufficiently stated to satisfy the requirements of s. 8 of the Bills of Sale Act, 1878, and because it was not in

accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

The bill of sale was in substance as follows:—"In consideration of the grantee having at the request of the grantor become guarantee, and having signed a promissory note for the payment of a sum of 45*l.* obtained by the grantor from W. J. Boyes, of which 32*l.* or thereabouts is now owing, and also of her [the grantee] having at the like request of the grantor paid on the 10th instant, the sum of 13*l.* in satisfaction of an execution against the grantor, and also of the sum of 23*l.* 17*s.*, now paid by the grantee to the grantor, and a sum of 3*l.* 3*s.* paid at the request of the grantor for the costs hereof, the said grantor doth assign to the grantee all and singular the chattels, &c., specifically described in the schedule by way of security for the payment of the said sum of 40*l.*, and for any moneys she [the grantee] may be called upon to pay in respect of the said guarantee, and interest thereon and on any payments which may be made as aforesaid, at the rate of 5*l.* per cent. per annum, and the said grantor doth further agree and declare that he will pay to the said grantee the principal sum aforesaid, and any further sums as aforesaid, together with interest then due, by monthly payments of 2*l.* on the first of every month."

The county court judge held that the bill of sale was good, and therefore gave judgment on the issue for the plaintiff.

A rule nisi had been obtained to set aside the judgment, and enter judgment for the defendant, against which

Clay, shewed cause. The 8th section of the Act of 1878 requires the consideration for the giving of the bill of sale to be stated. The consideration is in this bill of sale truly stated to be the grantee's having become surety for the repayment of a certain advance of 45*l.* made to the grantor, and certain moneys advanced by the grantee. Nothing further is necessary in order to comply with the Act than that the consideration shall be truly stated. It is not necessary that every detail of the consideration should be stated with the utmost minuteness. Secondly, the bill of sale does not substantially deviate from the form in the schedule to the Act of 1882, having regard to the nature of the transaction, which was not by way of security for a loan of money

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only to which the form in the schedule is more particularly appropriate. The bill of sale sufficiently complies with the form mutatis mutandis.

Sills supported the rule. First, the consideration is not sufficiently stated, for the bill of sale does not state exactly how much remained due on the guarantee and what the rate of interest was on the promissory note, and how much interest was due on it. A person reading the bill of sale could not therefore ascertain with sufficient accuracy the amount in respect of which the bill of sale was given. It only says "of which 32*l.*, or thereabouts, is now owing." Secondly, the bill of sale was void, as not following the form in the schedule to the Act of 1882. It does not specify the exact sum to secure which it is given, as required by the form; nor does it specify any precise time or times for repayment of such sum, which is also required by the form: *Davis* v. *Burton* (1); *Melville* v. *Stringer*. (2) The decisions in *Hetherington* v. *Groome* (3) and *Sibley* v. *Higgs* (4) are authorities to shew that it is not sufficient that the time or times of repayment should be ascertainable by reference to something dehors the bill of sale. The bill of sale must itself fix the time, so that any one looking at it may be able to ascertain the time of payment and the position of the grantor in that respect.

[MANISTY, J. In the case of a bill of sale given by way of indemnity to a surety it would be impossible to specify the exact amount in the bill of sale, or the exact time for repayment, because it remains to be seen in the future what the actual liability incurred by the surety will be, and when it will be enforced against him. It is difficult to see how such a transaction could be carried out otherwise than in the manner adopted by this bill of sale. Is it contended that the legislature intended altogether to prohibit such a transaction?]

If the nature of a transaction by way of bill of sale is such that it cannot be carried out in the form given in the schedule, it must be presumed that the legislature did intend to prohibit it: *Myers* v. *Elliott*. (5)

Cur. adv. vult.

(1) 11 Q. B. D. 537.
(2) 13 Q. B. D. 392.
(3) 13 Q. B. D. 789.
(4) 15 Q. B. D. 619.
(5) 16 Q. B. D. 526, at p. 530.

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June 2. MANISTY, J. This case is one of some importance. It raises in substance the question whether a bill of sale not given by way of security for repayment of a loan of money, but by way of securing an indemnity to the grantee against some liability which he has incurred at the request of the grantor, can, having regard to the terms of the Bills of Sale Acts, validly be given. There appear to have been two objects which the legislature had in view in passing these enactments. The primary object of the Act of 1878, as shewn by the title, appears to have been the amendment of the law for the preventing of frauds on creditors by secret bills of sale, whereas the primary object of the Act of 1882 seems to have been to protect needy, and oftentimes illiterate persons who seek to borrow money, and to regulate the giving of bills of sale by way of security for loans of money by an extortionate class of money lenders.

The bill of sale in this case is of a somewhat peculiar character, inasmuch as it is given for two purposes, partly as security for an advance of money, and partly by way of indemnity against a liability incurred by the grantee as surety for the grantor. It seems to me that the instrument must be considered as divided into two parts relating respectively to these two purposes, and as if each of such parts was a separate instrument.

One part of it is to this effect. In consideration of the grantee having, at the request of the grantor, become guarantee, and signed a promissory note for the payment of a sum of 45*l.*, of which 32*l.* or thereabouts, is now owing, the grantor assigns certain goods by way of security for any moneys the grantee may be called upon to pay in respect of the said guarantee, and interest thereon at the rate of 5*l.* per cent. per annum.

The objection is taken that the consideration for the bill of sale is not sufficiently stated, because the instrument does not specify the exact sum which remained due upon the promissory note for 45*l.*, part of which sum had been paid off. The effect of the Act of 1878, is to require the consideration to be truly stated; and it seems to me clear that this bill of sale does truly and sufficiently state the consideration, which was the grantee's having become security for the grantor.

The second objection is that the bill of sale is void, because it

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does not follow the form given in the schedule to the Act of 1882. That raises a very important question, for if a bill of sale by way of indemnity against such a liability as was incurred by the grantee cannot be given in this form, it is difficult to see how it could be given at all, because it would be impossible to make it more nearly in accordance with the form in the schedule. For the purpose of deciding this question it is necessary to consider the provisions of the Act of 1882, bearing in mind the objects of the Act as before stated, and to endeavour to ascertain from those provisions, whether there was any intention on the part of the legislature to prevent the making of a bill of sale such as this by way of securing indemnity to a surety.

The 9th section of the Act of 1882 is that which is relied upon as avoiding this bill of sale. That section provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed. The form in the schedule is as follows: "This indenture, &c., witnesseth that in consideration of the sum of £—— now paid to A. B. by C. D., the receipt of which &c. [*or whatever else the consideration may be*]." So far as those words go, there is nothing in them to exclude such a bill of sale as the present. But the form goes on: "He the said A. B. doth assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things, &c., by way of security for payment of the sum of £—— and interest thereon at the rate of —— per cent. per annum [*or whatever else may be the rate*], and the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum assured together with the interest then due by equal —— payments of £—— on the —— day of —— [*or whatever else may be the stipulated times or time of payment*]." These latter terms of the form seem to me to have been framed with reference to the ordinary case of a bill of sale given by way of security for the repayment of a loan of money.

It will be observed that by the terms of the 9th section it is not every bill of sale that is to be void if not made in accordance with the form. The legislature have for some good reason limited the application of that section. It applies only to a bill of sale

made or given by way of security for the payment of money by the grantor thereof, whereas the preceding and other sections are to apply to every bill of sale: and the terms of the form in the schedule are clearly adapted to the case which the enactment was particularly intended to meet, viz., that of a bill of sale given by way of security for the repayment of a loan of money which is, and must by the Act be, repayable at some specific time or times. It is obvious that the terms of the form with regard to the repayment of a specific amount of principal at a specified time or specified times are not in their nature exactly applicable to the case of such a security as that now before us; but I cannot think that the legislature thereby intended to prevent any person from giving a bill of sale by way of indemnity to a surety. It seems to me that to hold that such a bill of sale as this is void, because it does not conform in these respects to the form, would be going far beyond what presumably was the intention of the legislature in framing the form. If the words of the statute compelled us to hold that such a bill of sale was void, of course we must do so; but I do not think that they do so compel us if reasonably construed.

It does not seem to me that any of the authorities to which our attention has been directed is in conflict with the view which I am expressing. The case of *Davis* v. *Burton* (1), the first decision to which we were referred, was quite different from the present so far as the facts are concerned, and I only refer to it for the purpose of calling attention to certain expressions used in the judgments with regard to the objects of the Bills of Sale Act, 1882. The Master of the Rolls (2) points out that the object of the legislature in passing the Bills of Sale Act, 1882, was to protect borrowers of money by providing that the loan of money upon the security of a bill of sale should be a simple transaction; and so also Fry, L.J., says that the objects of the bill were to protect borrowers and to give publicity to the transaction for the information of persons dealing with borrowers, and that to that end the legislature intended that bills of sale should be certain in their terms. The next case referred to was *Melville* v. *Stringer*. (3)

(1) 11 Q. B. D. 537. (2) Page 539.
(3) 13 Q. B. D. 392.

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That was the case of a loan of money, and the bill of sale was of a very complicated nature, and made the sum secured payable on demand. It was held, following the view expressed in the case of *In re Williams, Ex parte Pearce* (1), that such a bill of sale was void because not in accordance with the form in the schedule. I do not think that there is anything in that case to which attention need be called, except the expressions used by the Master of the Rolls at page 400, where he again alludes to the intention of the Act of 1882 as having been to protect borrowers and prevent an indigent man who wishes to borrow money from being obliged to comply with the terms which a man possessing money might impose on him. *Hetherington* v. *Groome* (2) was again a case in which the money secured was made payable on demand, and the bill of sale was on that ground held to be void; but some of the observations of Fry, L.J., in that case, seem applicable to a case like the present, where, the provision being that the moneys which the grantee of the bill of sale may have to pay when the guarantee is enforced against him shall be repayable by monthly instalments, it is objected that no specific time for such repayment is mentioned. He says: "The words of the statute and schedule are perhaps not clear: they may well include a time fixed by reference to any known event; they may perhaps include a time to be ascertained by the happening of some contingency, but they do not in our opinion include a time to be ascertained by nothing but the mere choice and volition of the holder of the bill of sale." After that came the case of *Sibley* v. *Higgs* (3), which so far resembles the present case that the bill of sale was given by way of indemnity to a surety. In that case Field, J., held, following *Hetherington* v. *Groome* (2), that the bill of sale was bad, because it provided for the repayment of the sums which the grantee might as surety be compelled to pay, not at any specified time, but within seven days after demand in writing. I do not differ from the judgment given in that case by my Brother Field, but in this case the provision as to repayment is quite different. The time for repayment here does not depend, as in *Hetherington* v. *Groome* (2) and *Sibley* v. *Higgs* (3),

(1) 25 Ch. D. 656. (2) 13 Q. B. D. 789.
(3) 15 Q. B. D. 619.

on the mere volition of the grantee, but the provision is for payment by monthly instalments of so much a month. The case of *Myers* v. *Elliott* (1), which was the most recent case referred to, seems to me to have been a totally different case from that before us, and to have no bearing upon it. The objection there was that the bill of sale provided for the payment of a lump sum for interest and bonus, and did not specify how much was interest and how much bonus.

So far, therefore, as concerns the portion of the bill of sale which is for the indemnity of the grantee against liability under the guarantee, I do not see any reason for holding it void under the Act.

With regard to the portion of the bill of sale which is for securing to the grantee repayment of moneys advanced, it is only necessary to say that so far as that part of it is concerned the bill of sale appears to be in accordance with the form in the schedule, and I do not understand that any objection is taken to it. For these reasons I think that the bill of sale was good, and that the decision of the county court judge was right.

MATHEW, J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Grundy, Izod, & Grundy, for Toy & Broadbent.*

Solicitors for defendant: *Dodd, Longstaffe, Son, & Fenwick, for C. Heywood & Son.*

(1) 16 Q. B. D. 526.

E. L.

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April 19.

ALDRIDGE AND OTHERS *v.* FERNE.

Landlord and Tenant—Covenant to pay Rates, &c.—Owner's Proportion of paving Street—Metropolis Local Management Act, 1855 (18 & 19 *Vict.* c. 120), *s.* 105, *and Metropolis Local Management Act,* 1862 (25 & 26 *Vict.* c. 102), *s.* 96.

The lessee of a house in a new street within the metropolitan district covenanted with his lessor to pay during the term "all existing and future taxes, rates, assessments, land-tax, tithe or tithe rent-charge, and outgoings of every description for the time being payable either by the landlord or tenant in respect of the said premises":—

Held, that the owner's proportion of the cost of paving the street under 25 & 26 Vict. c. 102, s. 96, was an "outgoing" payable by the lessee under this covenant.

THE plaintiffs claimed to recover from the defendant, who held premises at Peckham under a lease at a rack-rent for nineteen years determinable at the end of the first five or twelve years,—with a covenant that the tenant would during the term pay "all existing and future taxes, rates, assessments, land-tax, tithe or tithe rent-charge, and outgoings of every description for the time being payable either by the landlord or tenant in respect of the said premises,"—a sum of 62*l.* 1*s.* 1*d.* which the plaintiffs had been compelled by the vestry to pay for the paving of the street upon which the premises abutted, under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, and the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), s. 96.

The defendant by his statement of defence admitted the allegations in the statement of claim, but denied his liability under the covenant.

R. Henn Collins, Q.C. (*J. R. Dunlop Hill*, with him), for the plaintiffs, moved for judgment upon the admission in the pleadings. The question is whether the expenses of paving the street under 25 & 26 Vict. c. 102, s. 96, were a sum payable in respect of the premises from which the defendant has by his covenant contracted to indemnify his landlords. The payment though not a "tax" or "rate," is an "outgoing for the time being payable either by the landlord or tenant in respect of the premises." In

Thompson v. *Lapworth* (1) it was held that the tenant had bound himself to pay a similar charge by force of the words "duties and assessments." Here, the words are "assessments and outgoings of every description," followed by words which are not found in any of the cases, "payable either by the landlord or tenant in respect of the said premises." In *Crosse* v. *Raw* (2) the tenant covenanted to pay "the sewers-rate, tithes, and all other taxes, rates, assessments, and outgoings whatsoever which at any times or times during the demise should be taxed, rated, charged, assessed, or imposed upon the demised premises, or upon the landlord or tenant in respect thereof;" and it was held that these words covered the expenses of making a drain which the landlord was called upon to incur under 29 & 30 Vict. c. 90, s. 10. In *Wilkinson* v. *Collyer* (3), where the tenant (under a three years' agreement) was held to be exonerated from a charge like that in the present case, the words of the covenant were limited to "all rates, taxes, and assessments payable in respect of the premises during the tenancy."

Channell, Q.C. (*Wedderburn*, with him), for the defendant. All the earlier cases are commented upon by Manisty, J., in *Wilkinson* v. *Collyer* (3); and the principle there laid down, and which must govern this case, is, that a covenant like the present one applies to rates or assessments of a temporary or recurring nature, and not to a payment charged in respect of that which is a permanent improvement of the owner's property. This judgment was mainly based upon the decision of the Court of Appeal in *Allum* v. *Dickinson*. (4) There, the tenant covenanted to pay "all rates and assessments charged, assessed, or imposed upon the demised premises, or upon the occupier or tenant in respect thereof;" and it was held that the proportion of the expense of paving, &c., the street upon which the premises abutted, payable under the Acts now under consideration, was not a rate or assessment payable by the tenant. In *Hill* v. *Edward* (5), Mathew, J., held that a covenant to pay the tithe or rent-charge in lieu of tithes, land-tax (if any), sewer-rates, main drainage rates, and all other taxes, rates, impositions, and outgoings whatsoever then or

(1) Law Rep. 3 C. P. 149.
(2) Law Rep. 9 Ex. 209.
(3) 13 Q. B. D. 1.
(4) 9 Q. B. D. 632.
(5) W. N. for 1885, p. 32.

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thereafter to be charged or imposed on or in respect of the said premises, or any part thereof, except landlord's property-tax," does not cover a demand like this. In *Rawlins* v. *Briggs* (1) the words of the covenant were, "all and all manner of taxes, rates, charges, assessments, and impositions whatever then or at any time or times during the term to be charged, assessed, or imposed on the premises hereby demised, by authority of parliament or otherwise howsoever;" and it was held, upon the authority of *Thompson* v. *Lapworth* (2), that the tenant was not liable to the cost of improving the drainage under the Public Health Act, 1875.

Collins, Q.C., was heard in reply.

GROVE, J. It is difficult to extract any very distinct rule from the numerous cases upon this subject. But it seems to me that the only broad principle is that laid down by my Brother Manisty in *Wilkinson* v. *Collyer* (3); that a covenant by which the tenant stipulates that he will pay "all rates, taxes, and assessments payable in respect of the premises during the tenancy, except land-tax and landlord's property-tax," applies only to rates and assessments of a temporary or recurring nature, and not to a sum which is a charge upon the property giving it an increased present value." My first impression was that that case governed the present; but, looking at all the cases, I do not find that in any one of them the covenant contained such comprehensive words as the covenant now under consideration,—rates, &c., "for the time being payable either by the landlord or tenant in respect of the said premises." The covenant here also has the word "outgoings," which is at least as strong as "duties," which has been relied upon in some of the cases. This payment was unquestionably an "outgoing," and a "future" outgoing which was for the time being payable either by the landlord or the tenant in respect of the premises. It is true the word "outgoings" does occur in *Hill* v. *Edward* (4); but the words "for the time being payable either by the landlord or tenant in respect of the premises" do not occur; and I am by no means sure that I should have taken the same view as my Brother Mathew. At all events, I am

(1) 3 C. P. D. 368.
(2) Law Rep. 3 C. P. 149.
(3) 13 Q. B. D. 1.
(4) W. N. for 1885, p. 32.

clearly of opinion that the words of this covenant are far more comprehensive than that of those of the covenants in any of the other cases referred to by the counsel for the defendant.

STEPHEN, J., concurred.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *Gilbert Robinson.*
Solicitors for defendant: *Godfrey & Webb.*

J. S.

[IN THE COURT OF APPEAL.]

April 13.

BUNCH AND WIFE *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Company—Passenger's Luggage—Luggage to accompany Passenger—Delivery to Porter—Loss by Negligence of Porter—Liability of Company.

The female plaintiff arrived at a station on the defendants' railway forty minutes before the time at which the train by which she intended to travel was to start. She had a bag and two other articles of luggage, which a porter took into the station. She saw the two labelled, and told the porter she wished the bag to be put in the train with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe, and she then went to meet her husband and get a ticket. They returned together in ten minutes and found that the two labelled articles had been put into the van but that the bag was not forthcoming. At the trial in the county court the judge found that the porter had been negligent in not being in readiness to put the bag into the carriage on the return of the female plaintiff, and that the defendants were liable for its loss:—

Held (by Lord Esher, M.R., and Lindley, L.J., Lopes, L.J., dissentiente), that there was evidence to warrant the judge in finding that the bag was entrusted to the porter for the purpose of the transit, and not to be taken charge of while the journey was suspended, and that he was acting within the scope of his authority in taking charge of it.

By Lord Esher, M.R., that so long as passenger's luggage intended to be taken in the train with the passenger is in the custody of a porter for the purpose of the transit, either at the commencement or conclusion of the journey, the railway company are common carriers of it, but that while it is in the carriage and partially under the control of the passenger, the railway company are not common carriers, but are liable as carriers for negligence only.

Bergheim v. *South Eastern Ry. Co.* (3 C. P. D. 221) explained.

APPEAL from the judgment of a Divisional Court setting aside the judgment obtained for one of the plaintiffs at the trial of the action in the Marylebone County Court.

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The action was brought against the defendants to recover the value of passenger's luggage alleged to have been lost by the negligence of the defendants. The judge's note of the evidence of Mrs. Bunch was as follows: "On the 24th of December last year, I arrived at the Great Western Railway Station (Paddington) at 4·20 with portmanteau, hamper, and a Gladstone bag belonging to my husband. A porter came forward and took same on a trolly to be labelled. I saw portmanteau and hamper labelled to Bath. I told him I wished Gladstone bag to be put in train, and asked him if it would be safe to leave it with him. He replied that it would be quite safe, and he would guard the luggage and put it in the train. I went back to meet my husband and get ticket. I met my husband; he had taken ticket. We returned where luggage had been, the trolly had gone away, the luggage had been put in the van, and the Gladstone bag was not forthcoming. The porter was standing by the luggage when I left him, and the Gladstone bag was there all safe then. I saw the porter still there two minutes after I left him. I returned with my husband ten minutes after, and he was gone. Cross-examined: I met my husband in front of the station; my husband got my ticket—I do not know when. I am quite sure porter said luggage would be all right. It was a little after half-past four when I came back. There was a great crowd, it being Christmas eve." From the evidence of the husband it appeared that he had arranged to go by the five o'clock train; that he took his own ticket from Moorgate Street to Bath; that he went to the Great Western Station and took his wife's ticket, and subsequently met his wife standing at the entrance of the first class booking office; that they went straight through on to the platform where the luggage was left, and that there was no trolly or luggage there. The defendants produced at the trial a printed notice to passengers, a copy of which was in the labelling vestibule, the material part of which was as follows: "Passengers are required to see their luggage duly labelled, as until so labelled it will not be put into the trains, nor will the company assume or incur any responsibility in respect thereof. The company's servants have strict orders not to take charge of any luggage or parcels; and if passengers are desirous of leaving

them under the charge of the company, they must themselves take, or see them taken to, and deposited in the cloak room." The defendants also produced tickets similar to that taken at Paddington which purported to be issued subject to the conditions stated in the company's time tables, and copies of the time tables, containing among the general notices and regulations the following: "The company will not in any case be liable for luggage taken with the passengers into the carriages, but only when it is properly labelled and placed in a luggage van. The company will not be responsible for luggage not labelled or improperly labelled."

The county court judge found that the porter was guilty of negligence in not being in readiness to put the bag into the carriage with Mrs. Bunch on her return as promised, and he held the defendants liable and entered judgment for the plaintiff Mr. Bunch, and a non-suit against his wife.

The defendants obtained a rule nisi to set aside the judgment and enter judgment for the defendants or for a new trial. On the argument in the Queen's Bench Division, Day and A. L. Smith, JJ. differed, but the latter, who agreed with the decision of the county court judge, withdrew his judgment. The rule was accordingly made absolute to enter judgment for the defendants, but leave was given to appeal. The plaintiffs appealed.

C. C. Scott, for the plaintiffs. The question is, whether there was any evidence on which the judge could find that the bag was in the custody of the defendants. The porter received all three articles entrusted to him as the servant and by the authority of the defendants, and his receipt was a receipt by them. There can be no distinction between the receipt of the bag and of the two articles, and it is impossible to contend that the company do not hold out their porters as having authority to take possession of passenger's luggage intended to be labelled. Nothing afterwards happened to alter this state of things, for all the delay that took place was incidental to the journey, and therefore to the contract of carriage. If the bag was in the custody of the railway company they are liable, for the county court judge finds as a fact that there was negligence. [He cited *Bergheim* v. *South Eastern*

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Ry. Co. (1); *Leach* v. *South Eastern Ry. Co.* (2); *Agrell* v. *London and North Western Ry. Co.* (3); and *Lovell* v. *London, Chatham and Dover Ry. Co.* (4)

R. S. Wright, for the defendants. The cases cited are of luggage intended to go into the van. A different principle applies to luggage which is to accompany the passenger and be under his control. As to such luggage the company give full notice that they will not be responsible, and it cannot be said that they hold out their porters as authorized to take charge of it when in fact they prohibit their doing so. If there was any contract at all with the company it was subject to the conditions of the contract for carriage of the passenger when made, and under the conditions of that contract the defendants are exempt from liability. Even if there was authority to take the bag from the cab to the train there was no authority to guard it for the convenience of the passenger during her absence. The company are not common carriers of such luggage: *Butcher* v. *London and South Western Ry. Co.* (5), and *Richards* v. *London, Brighton and South Coast Ry. Co.* (6), are overruled by *Bergheim* v. *Great Eastern Ry. Co.* (7) [He also cited *Talley* v. *Great Western Ry. Co.* (8); *Hodkinson* v. *London and North Western Ry. Co.* (9); and *Cohen* v. *South Eastern Ry. Co.* (10)]

C. C. Scott, in reply, referred to s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

LORD ESHER, M.R. In this case the question has been tried in the county court, and upon that there was an appeal to the Divisional Court consisting of two judges, my Brothers Day and A. L. Smith, who differed in opinion; and the latter, for the purpose of allowing the case to come to the Court of Appeal, withdrew his judgment, and the case is here by leave.

The question is, whether there was evidence before the county court judge upon which he might reasonably find for the plaintiff. If there was such evidence, neither the Divisional Court nor this Court is entitled to overrule the decision.

(1) 3 C. P. D. 221.
(2) 34 L. T. (N.S.) 134.
(3) 34 L. T. (N.S.) 134, n.
(4) 45 L. J. (Q.B.) 476.
(5) 16 C. B. 13; 24 L. J. (C.P.) 137.
(6) 7 C. B. 839; 18 L. J. (C.P.) 251.
(7) 3 C. P. D. 221.
(8) Law Rep. 6 C. P. 44.
(9) 14 Q. B. D. 228.
(10) 2 Ex. D. 253.

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The evidence was that a ticket had been taken by the husband at Moorgate Street by which he was to go to Paddington, and from there some distance into the country. His wife was to meet him at the station; she brought the luggage, and when she arrived at the Paddington Station, the three articles were taken by a porter into the station. She told him where they were to go to, but said she wished the Gladstone bag to be put into the train, that is, into the carriage with her, and asked if it would be safe to leave it with him. It is obvious, or at all events it was obvious to the county court judge, that the way to treat the matter is, as though she had said: "My husband is coming to meet me, we are going by the train, I have brought the luggage here and I am going to meet him at this station and take my ticket—will the things be safe?" Then she goes and meets her husband at the station, at the ticket office where her husband has taken a ticket for her, and when they come back the bag is gone. The evidence is that she was away for ten minutes. We must take into account, no doubt, that when she went to the station, it was forty minutes before the train was advertised to start, but the evidence is open to this construction—that the train actually came up to the platform ten minutes after she got there.

The question arises, what are the liabilities of the company with regard to that bag? It is said that the porter had possession of it beyond the scope of his authority; and that, therefore, if anybody is liable for its loss it is the porter and not the railway company. It seems to me, that with regard to the public, the scope of a porter's authority is to be measured by what the company deliberately allow their porters to do, and they cannot say that a porter is acting beyond the scope of his authority with regard to the public, by reason of some secret orders which they have given to him. That is the first proposition I put.

Now what do porters do, when you arrive at a station? The railway company, as we know, allow their porters to take the luggage on to the platform. That is the first step. When it is on the platform, on any part of the platform in some railway stations, or at a particular part of the platform in other railway stations, if you tell them where you are going, and your luggage is to go into the van, it is labelled. But all that time, before it

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is labelled, and after and until it is put into the van, it is generally in the custody of a porter, and almost always of the porter who first took it.

Now, with regard to that labelled property, it seems to me that it is within the scope of the porter's authority to take that luggage on behalf of the railway company; and from the moment it gets into the possession of a porter it is in the possession of the railway company for the purposes of carriage unless something intervenes to alter that state of things. Until that something intervenes, that luggage is in their custody for the purpose of conveyance; they are common carriers of it, and liable as common carriers.

Now comes the case of luggage which is not to go into the van. Here again it must be known to everybody that the porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or to the carriage. During the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company. I cannot see any distinction during that time between the luggage which is to be labelled, and the luggage which is not, or between the luggage which is labelled, and the luggage which is not, up to the time when they arrive at the train. Now, when luggage arrives at the train, if you no longer leave it to the railway company to put it where they please in the train, but insist that it shall be put into a carriage in which you are going, you alter the state of things; you take it partly into your own control, but not absolutely, because, as pointed out in some of the cases, when the company are carrying you, they are carrying your box or parcel as well. Under those circumstances they are not liable as common carriers, although the thing is in process of conveyance, because you have taken it partly into your own control, but they are liable as bailees, as people who have undertaken to carry you and your luggage, and they are liable only for negligence.

When you arrive at the other end it is equally well known that the companies hold out to the public that their porters may take luggage from the carriage to the entrance of the railway, and there put it into a cab. If they were common carriers at the

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beginning of the journey, that is, from the entrance of the station to the carriage, I cannot see but that at the end of the journey, the thing being still in process of conveyance, and exclusively in their power, they are common carriers in such case also. Thus the condition and the liability of common carriers is only suspended during the time when joint possession is taken with the railway company, that is, whilst the parcel is in the carriage with you where you have directed it to be put. But when it is in the possession of the porters in a way in which, and at a time when, the company allow their porters to take it, by holding them out as having authority to take it, then it seems to me that it is being conveyed by the company, they are paid for the conveyance of it, and they are common carriers of it.

There is another state of things. You may have your luggage taken on to the station, and you may not be for a time going on your journey; and if, suspending your journey, you put your things into a cloak room, you put them there, not for the purpose of being conveyed, but for the purpose of being warehoused. If, instead of putting the company into the position of warehousemen, you give the luggage to a porter, or to a bystander, or to anybody else upon the same conditions, the same reasoning applies. If, therefore, you ask a porter to take it under such circumstances that the proper conclusion of fact is that it is not there for the purpose of conveyance, but for a time for another purpose, of course you cannot put the railway company into a position of responsibility, and you must look to the porter alone. But that is always a question of fact, and depends upon a considerable number of circumstances. It is not because a person asks a porter "Would this be safe whilst I do a certain thing," or because a person says to a porter "Will you take care of this," that that is conclusive that the journey is suspended. It is not conclusive. Supposing, for instance, you take your luggage to the station, and the porter takes it from you, and you say "Will this be safe with you whilst I go to the ticket office to take my ticket." The ticket office may not be open, or there may be ten or twenty people before you in a line, and you have to wait your turn, but can anybody say that the transit of your luggage is stopped meanwhile because of these temporary checks, which are

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not intended to suspend the journey, but which are incidents of the journey? It would be monstrous to say—that is my opinion—that the porter is exceeding his authority if he holds your luggage for you whilst you take your ticket. I will go further, and ask if he carries it up towards the carriage, and you say "I am going to get a newspaper at the bookstall," and he loses it whilst you are gone for your newspaper to the bookstall, has the whole relation been changed whilst you go to the bookstall? Or, if you go to the refreshment room, which has been opened there by the authority of the railway company, and in order that passengers may go to it during their journey, if the porter were to hold your bag whilst you go to the refreshment room, it being your understanding all the time that the journey is going on, and that that is part of it, and an incident in it, I cannot think that the relation between you and him is altered. As long as you do not suspend your journey your luggage is in the care of the railway company, and they are liable as common carriers, except during a time when you yourself take part possession of your luggage, and although they are not common carriers during that time, that is, from the moment when that relation of common control between you and them takes place, yet before you come into that position they are common carriers, and after that position of common control ceases they are common carriers. That is my view of the law.

Now it is said that view has been overruled, and decided by a Court of equal jurisdiction with this in the case of *Bergheim* v. *Great Eastern Ry. Co.* (1) In *Butcher* v. *London and South Western Ry. Co.* (2), the plaintiff, a passenger by railway, brought with him into the carriage a carpet bag containing a large sum of money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his hand, the plaintiff permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter, having found a cab (within the station), placed the carpet-bag on the foot-board thereof, and then returned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared, and the carpet-bag and its contents were lost. Now what was there the case? It is

(1) 3 C. P. D. 221. (2) 16 C. B. 13; 24 L. J. (C.P.) 137.

obvious that there, some of the luggage was in the van, and the porter went back to take it out:—"Held, that this was a loss by the negligence of the company, for which they were responsible in damages." I note the word "negligence," but I take it they were there held liable as common carriers, because it cannot be said that it was negligence to put a thing on the footboard of a cab, which was the very place where it was to be put.

In *Richards* v. *London, Brighton, and South Coast Ry. Co.* (1), it was proved that the plaintiff's wife, accompanied by a female servant, took places for London in a first-class carriage on the defendants' railway at the Woodgate Station, near Bognor, bringing with them a considerable quantity of luggage, which was weighed, and the excess beyond the quantity allowed to first-class passengers paid for. On their arrival at the terminus at London Bridge, the lady, who was an invalid, was assisted to a hackney coach, into and upon which the luggage was placed by certain servants of the company, who, upon the maid attempting to remove the small articles from the railway carriage to the coach, desired her not to trouble herself, as they (the porters) would see to the luggage. Upon reaching the residence of the plaintiff it was for the first time discovered that part of the luggage, viz., a dressing-case containing trinkets and jewellery which had been placed, by the driver of the fly which conveyed the plaintiff's wife and her servant from Bognor to the Woodgate Station, under the seat of the railway carriage, was missing: "Held, that the duty of the defendants as common carriers continued until the luggage was placed in the hackney carriage." There is a case directly in point, only it relates to the other end of the journey. I should mention also *Leach* v. *South Eastern Ry. Co.* (2), which seems to me to come to the same thing. Are they over-ruled by *Bergheim* v. *Great Eastern Ry. Co.*? (3) In my opinion they are not. As I say, whilst the thing is in the carriage with you, or in the carriage where you have directed it to be put, inasmuch as you have taken part control during the time that you do so, the company are not common carriers, although they are carriers. That I take to be the law. The question

(1) 7 C. B. 839; 18 L. J. (C.P.) 251. (2) 34 L. T. (N.S.) 134.
(3) 3 C. P. D 221.

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must always be whether the facts bring it within that view of the law. In my opinion, therefore, the question must be a question of fact. Had this lady, who had the control over the thing at the time, given this luggage to the porter for the purpose of suspending the journey, so that it should be in his custody, not for the purpose of going on the journey but for the purpose of holding it for a time whilst she suspended the journey? It seems to me it it was open to the county court judge to say she brought it there and gave it to the porter at the commencement of the journey and that she only asked him whether it would be safe in his custody whilst she proceeded to take a step in that very journey which had then commenced, namely, to go to the ticket office and take the ticket. Under those circumstances, until it was in the carriage where she told him it was to be put, whether it was ticketed or not, the porter, according to his usual habit, as authorized by the company, had taken it into his possession for the company, and it was in the possession of the company for the purpose of the transit. The transit was all the time proceeding, although of course subject to the ordinary delays, and therefore they held this bag as common carriers.

With regard to the question of liability being limited by the ticket. If the company authorized its servant to take possession of the luggage before a ticket was obtained, what is on the ticket cannot affect the matter. Whether this luggage was carried under the ticket taken by the husband at Moorgate Street, or under the ticket given to the wife, is a problem which I do not care to solve. If the latter is the case, the bag was lost before that ticket was given. If the former, no evidence of what that ticket was was laid before the county court judge; and further, a ticket taken in Moorgate Street could not be any notice with regard to luggage which was put in at Paddington.

I am of opinion that there was evidence in this case upon which the county court judge might properly find the facts to be as I have suggested they might be, and what is more, if I myself had been the judge of fact I should have found exactly as the county court judge has found.

I am of opinion there is no ground for disturbing the judgment of the county court judge.

LINDLEY, L.J. This case has been argued in such a way as to raise a question of considerable importance, although the case seems to me to be one which need not necessarily raise any such question. No doubt this is an instance of the struggle which is going on day by day between railway companies and the public. The railway companies want to throw off from themselves all the responsibility which they can, and they try to do it to an extent which does not always succeed. On the other hand it may be that the public want to throw on them responsibilities which are too onerous, and such attempts are on their side often unsuccessful.

Now the company in this case profess by their notice that they will not be in any case liable for luggage taken by the passengers into the carriage—not liable even for the negligence of their own servants. That appears to me to be entirely unreasonable, and goes a great deal too far. They are not common carriers in respect of luggage taken by passengers into the carriages, but they are liable for negligence, and it appears to me such a notice as they put out, and such a profession as they make, is met by the provision of the Railway and Canal Traffic Act, s. 7. It is true that in *Cohen* v. *South Eastern Ry. Co.* (1), the luggage there was not taken with the passenger, but as I understand Mellish, L.J.'s, judgment, it extends beyond that, and applies to all luggage which is carried, whether with passengers or otherwise. The other notice on which they rely is to the effect that if passengers are desirous of leaving luggage or parcels under the charge of the company they must themselves take or see them taken to and deposited in the cloak room. Now whether this is unreasonable or reasonable, turns upon the construction of the notice that the company's servants have orders not to take charge of any luggage or parcels. A porter in one sense takes charge of luggage or parcels if he takes them for a purpose which is admittedly within the scope of his employment. It strikes me, applying a reasonable construction, what is meant is this: if you want to leave parcels in the charge of the company as distinguished from having them taken to a train by which you are going, or taken from a train, you must leave them in the cloak room, and not leave them about

(1) 2 Ex. D. 253.

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the platform, or entrust them to a porter. If here the time was so long that as a matter of ordinary business it would be reasonable to say that the bag ought to have been put in the cloak room and not entrusted to the porter, I should have thought it would be just and reasonable on the part of the company to say they were not responsible. But the facts of this case appear to shew, to my mind at all events, that this Gladstone bag never was taken charge of or given in charge to the porter at all except for the purpose of transit. This was Christmas Eve, and at Paddington station, and there was a throng of people. The train started at 5. The plaintiff's wife, who had got the luggage and took the ticket, arrived at 20 minutes past 4—40 minutes before the train started. Whether the train was actually drawn up at the platform at the time she arrived, or not, I cannot make out from the notes, probably it was not. It certainly was drawn up at the platform at half-past 4, how much earlier I do not know. The lady arrived, and then, to use her own language—I will take the judge's notes—what happened was this—"A porter came forward and took the luggage on a trolly to be labelled. I saw the portmanteau and hamper labelled to Bath. I told him I wished the Gladstone bag to be put in the train"—that no doubt means the carriage—"and I asked him if it would be safe to leave it with him. He replied that it would be quite safe, and he would guard the luggage and put it in the train. I then went back to meet my husband and get my ticket." Then she says—she was away ten minutes, and when she returned the trolly had gone away, and the luggage had been put into the van. That shews to demonstration that the train was up. Can she be said to have employed that porter to take charge of those things as distinguished from taking them to the carriage? That is a question of fact on which, as I understand, Day, J., and A. L. Smith, J., differed. I take the view which has been adopted by the county court judge and A. L. Smith, J. It seems to me to be a simple case of transit, not of entrusting to the porter in any sense than that in which everything put into his hands is entrusted to him. It is very true that there was some short time during which it would not be necessary for him actually to keep walking or rolling this trolly. There was a short delay, but a delay so short as to make

it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential in this case to say more than this, that the porter was acting within the scope of his employment in taking this luggage in the way he did from the cab to the train. Whether during that interval the railway company were common carriers, as is stated by the Master of the Rolls, or whether they were not, appears to me to be immaterial for the purpose of this particular decision. Because even if they were not, if we once arrive at the conclusion that the porter was acting within the scope of his authority, the county court judge has found negligence, and that is sufficient for this case. I prefer to stand upon that, and that is what we are to go on in this case. The other appears to be a difficult point. The view taken by the county court judge appears to me to be right, and therefore the appeal ought to be allowed.

LOPES, L.J. It is to my mind impossible to say that this is not a case of considerable importance, having regard to the fact that railways are now almost the exclusive mode of locomotion in this country, and the question raised greatly affects the liabilities of railway carriers, and also the remedy which belongs to passengers against those companies. I regret very much to say that I differ from the judgment and conclusion which has been arrived at by the rest of the Court in this case. I do not mean to say that I differ from some of the illustrations which have been put by the Master of the Rolls. I entirely adopt them, but I do not hesitate to say that I think they differ from this case toto cælo. The question is this, was there any evidence upon which the county court judge might reasonably find for the plaintiff. In my opinion there was no evidence that the porter took charge of this Gladstone bag on behalf of the company.

Now it is most important in this case to ascertain the actual facts, and I know of no better way of getting at them than to read a portion of the evidence. This lady arrived at the Paddington Station, and her husband was to come from Moorgate Street to meet her at that station, and the account she gives is this. She says: "I had the three articles—the portmanteau, the hamper, and the Gladstone bag, and a porter came

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forward and took the same on a trolly to be labelled. I saw the portmanteau and hamper labelled to Bath. I told him I wished the Gladstone bag to be put in the train, and I asked him if it would be safe to leave it with him. He replied that it would be quite safe and that he would guard the luggage and put it in the train. I then went back to meet my husband, and get my ticket. When I came back the luggage had been put in the van"—that is, the other two articles—"and the Gladstone bag was not forthcoming. The porter was standing by the luggage when I left it, and the Gladstone bag was there all safe then. I saw the porter still there two minutes after I left him. I returned with my husband about ten minutes afterwards, and the bag was gone." Then she says: "I am quite sure the porter said 'the luggage will be all right.' It was a little after half-past 4 when I came back. There was a great crowd." Under these circumstances the question which arises is this: was the porter acting within the scope of his authority. If he was, the company are liable; if he was not, I take it the company are not liable.

Now, first, let me consider what is the employment of an ordinary porter. I should say that an ordinary porter was the servant of the company to carry or transport goods from the cab or the outside of the station to the train. I do not care whether it be van goods or hand goods. But I should say that it was not part of the employment of a porter to take charge of luggage except during that transit. I mean by that during the time which is fairly and reasonably necessary for that transit. Now it seems to me that there is an important and significant distinction between the hamper and portmanteau and the Gladstone bag. That the two articles, the hamper and the portmanteau, were taken by the company as common carriers there can be little doubt, and they were liable for them. But was the bag so taken? Suppose the bag instead of being left on the barrow, if the train had been in, had been put into the carriage in which the lady intended to travel, it is perfectly clear that, inasmuch as there would have been no negligence, the company would not have been liable had it been lost. Nor are they, it seems to me, when the bag is left in charge of the porter to be subsequently put into the train with the passenger. It appears to me that she

had intended, obviously intended, to resume the possession of that bag at a later period and take it into the carriage with her. It seems to me that in effect she always retained personal control over that bag. I am at a loss to see how it can be said that the company are to be liable for that bag when left in the charge of the porter subsequently to be placed in the carriage, when if it had been placed in the carriage they would not have been held liable as insurers.

Putting it shortly, my view is this. I do not think it is part of the employment of an ordinary porter to take charge of luggage beyond the time usually or reasonably—I should say reasonably—necessary for this transit. I am referring now to the luggage which is not labelled, but which is subsequently to be placed in the carriage with the passenger. Nor do I think that an ordinary porter is the agent of the company to take charge of passenger's luggage, such as this Gladstone bag, whilst the passenger is otherwise employed for his own convenience.

It may be said that the passenger here was not otherwise employed for her own convenience. The evidence, however, is not as it was put by the Master of the Rolls, as I understood him, that she merely went for the purpose of getting the ticket, which would have taken a very short time, and might have been done almost in sight of the luggage for anything I know, but she went for the purpose of meeting her husband, and meeting him outside the entrance to the booking office. Can it be said that was not for her own convenience? In the course of the argument it was conceded, as I understood, that if the passenger had gone away to some neighbouring shop, and had left the bag in the way it was left, then the company could not be liable. It was suggested that if the defendants were not to be liable in this case, the business of a railway company could not be carried on. I do not venture to express an opinion as to whether that is a correct observation or not. But it appears to me there is another observation which may be made with equal force and equal justice, and that is this: if it is to be held that a railway company should find porters at their stations to take charge, for the period of ten minutes, of hand luggage of passengers who arrive there, it seems to me very difficult to see how the business of a

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railway company could be carried on. My view, therefore, entirely agrees with the judgment of Day, J., in the Divisional Court, and I think the judgment of the county court judge was wrong.

Appeal allowed; Judgment for the plaintiffs.

Solicitors for plaintiffs: *Ingle, Cooper & Holmes.*
Solicitor for defendants: *R. R. Nelson.*

A. M.

April 17.

[IN THE COURT OF APPEAL.]

HALL & CO. *v.* THE LONDON, BRIGHTON, & SOUTH COAST RAILWAY COMPANY.

Railway Commissioners—Special Case—Appeal from Divisional Court to the Court of Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—"*Passing of the Act.*"

No appeal lies to the Court of Appeal from a decision of a Divisional Court on a special case stated by the Railway Commissioners under s. 26 of the Regulation of Railways Act, 1873.

APPEAL by Messrs. Hall & Co. from the decision of a Divisional Court on a special case stated by the Railway Commissioners under s. 26 of the Regulation of Railways Act, 1873. (1)

March 8. *Macrae* (*Sir R. Webster, Q.C.*, and *Macdonell*, with him), for the respondents. There is a preliminary objection to this appeal. By the provisions of the 26th section of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), the decision of the Court for the opinion of which a case might be stated was to be final. Consequently by s. 20 of the Appellate Jurisdiction Act, 1876, no appeal lies. The appellants may rely on the 45th section of the Judicature Act, 1873, which enacts that all appeals from Inferior Courts which might "before the passing" of the Act have been brought to any court or judge whose jurisdiction is by that Act transferred to the High Court may be heard by Divisional Courts, whose determination shall be final unless special leave to appeal is given. But no appeal could have been brought

(1) Reported 15 Q. B. D. 505.

before the passing of the Judicature Act, 1873, which was the 5th of August of that year, because the Regulation of Railways Act, 1873, was passed on the 21st of July, but by s. 2 it did not come into operation until the 1st of September, and before that date there was no Court in existence to state a case, and consequently no appeal was possible.

Littler, Q.C., and *C. A. Hunter*, for the appellants. The case is stated under the authority of an Act which was in existence before the passing of the Judicature Act 1873. The Act speaks from the time when it passed, and not from the time when it came into operation: *Ings* v. *London and South Western Ry. Co.* (1); and *Wood* v. *Hunt.* (2) The case is therefore within s. 45 of the Judicature Act, 1873. Further, no part of that section was directed to come into operation on the passing of the Act, and consequently the operation of the whole section was postponed by the Judicature Act, 1874, s. 2, to November, 1875, and that is the time at which the section applies. At that date the Court of the Commissioners was established, and cases which had previously been stated for the opinion of one of the Superior Courts, would go before a Divisional Court under s. 45, all the provisions of which including that as to leave to appeal would apply. The only way the appellants got before a Divisional Court was by s. 45, which they now say does not apply: *Wood* v. *Hunt.* (2)

Macrae, in reply. Sect. 16 of the Judicature Act, 1873, gave jurisdiction to the High Court over this case, and s. 45 only deals with the mode of exercising that jurisdiction.

Cur. adv. ult.

April 17. LORD ESHER, M.R. In this case the Railway Commissioners, by the authority of the Acts under which they are constituted, reserved a case for the opinion of the Divisional Court, and the Divisional Court thereupon made an order or judgment, and an appeal is brought here. A preliminary objection was taken that there is no appeal, and we had to consider that matter.

It seems obvious that there is no appeal if the case is governed by the Appellate Jurisdiction Act, 1876, s. 20, but it was

(1) Law Rep. 4 C. P. 17. (2) Law Rep. 4 C. P. 18, n.

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suggested that there was an appeal by reason of s. 45 of the Judicature Act, 1873. Upon reflection, I am of opinion that this case is not within that section. The Judicature Act of 1873 received the royal assent on the 5th of August, 1873. It is true that the coming into operation of that Act was afterwards postponed till the 1st of November, 1875, but the Act of 1873 was really passed on the 5th of August, 1873; and then became an Act of Parliament. The Railway Commissioners were constituted under an Act of 36 & 37 Vict. c. 48, which received the royal assent on the 21st of July, 1873. But in that very Act it is said that the Act is to come into operation in September, 1873. Therefore it seems to me the Railway Commissioners were not really commissioners until September, 1873, that is, after the time of the passing of the Judicature Act, 1873. The Railway Commissioners, therefore, did not exist at the time of the passing of that Act. Section 45 only applies to a case where there might have been an appeal before the passing of the Act. I think this case is not within s. 45, and that therefore there is no appeal.

LINDLEY, L.J. I am of the same opinion. The first Act of Parliament which it is necessary to allude to is the Regulation of Railways Act, 1873, which was passed on the 21st of July, but which came into operation on the 1st of September. Under that Act certain commissioners are appointed, and by the 26th section it is enacted that they may state a case for the decision of one of the superior Courts; and then it states that the order of that Court shall be final and conclusive on all parties. That being the case, it is obvious that under that Act no further appeal could take place. Then we have to consider the provisions of the Appellate Jurisdiction Act, 1876, s. 20, which, so far as its terms are concerned, are clearly applicable to the case to which I have alluded. That section says, "Where by Act of Parliament it is provided that the decision of any Court or judge the jurisdiction of which Court or judge is transferred to the High Court of Justice is to be final," which was the case under s. 26 of the Regulation of Railways Act, 1873, "an appeal shall not lie in any such case from the decision of the High Court of Justice or of any judge thereof to Her Majesty's Court of Appeal." Therefore,

putting these two Acts of Parliament together, it is plain that there could be no appeal.

But then reliance is placed upon s. 45 of the Judicature Act, 1873, as construed by this Court in the case of *Crush* v. *Turner*. (1) This section applies only to appeals from inferior courts which might, "before the passing of this Act," have been brought to any Court or judge whose jurisdiction is transferred. Now it is quite impossible to say that the present case falls within that language. The passing of the Judicature Act, 1873, was on the 5th of August, 1873; that is the actual day of its passing; and unless therefore we can say that "passing" in s. 45 is equivalent to "coming into operation," it is quite obvious that this case cannot be brought within s. 45. Such a construction was contended for by the appellants on the authority of *Ings* v. *London and South Western Railway Company* (2), and an expression of the present Master of the Rolls in that case was relied upon as favouring the general doctrine, that although an Act does not come into operation until a particular day, yet it speaks from the time of its passing. Of course that expression must be looked at with reference to the facts of that case, and with reference to the facts it was perfectly warranted, but it does not help the appellants in this case.

In *Ings* v. *London and South Western Railway Company* (2), as also in the case of *Wood* v. *Hunt* (3), the dates were these. The County Court Act which was there in question was passed on the 20th of August, 1867. It came into operation on the 1st of January, 1868, and the section which the Court had to deal with runs thus: "If in any action commenced after the passing of this Act." The Court there had to apply that section to an action which was commenced after the passing of the Act and before the Act came into operation. The action there was commenced on the 5th of October, 1867, in the interval between the passing of the Act and the coming into operation. The case was therefore exactly and precisely within the expression "an action commenced after the passing of the Act." So far from that case being an authority to the effect contended for by the appellants, it seems to me to

(1) 3 Ex. D. 303. (2) Law Rep. 4 C. P. 17.
(3) Law Rep. 4 C. P. 18, n.

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be an authority entirely the other way, the distinction between passing and coming into operation being as marked there as can possibly be expected, and the decision was not that Acts of Parliament which pass one day and come into operation at a later day, are to take effect as from the time when they pass, but that the wording of this section was too strong to be got over.

It appears to me therefore that the preliminary point should be allowed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *Neish & Howell.*

Solicitors for respondents: *Norton, Rose, Norton, & Co.*

A. M.

April 3.

O'NEIL *v.* CITY AND COUNTY FINANCE COMPANY, LIMITED.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 13—*Seizure under Bill of Sale—Goods in Public Highway—Removal within five Days—Action for.*

By the Bills of Sale Act (1878) Amendment Act, 1882, 45 & 46 Vict. c. 43, s. 13, chattels seized or taken possession of under a bill of sale "shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days."

A horse and carriage were seized, under a bill of sale, in a public street and at once removed to premises of the grantee, and after five days were sold by him:—

Held, that the seizure in the street was lawful, and, in the absence of actual damage arising from the removal within the five days, no action would lie.

APPEAL from the Liverpool Court of Passage. The statement of claim in the action alleged that a bill of sale had been given by the plaintiff to the defendants, whereby certain horses, cabs, and harness had been assigned as security for the repayment by instalments of a loan; that on the 17th of June the defendants wrongfully seized and took possession of a horse and cab of the plaintiff whilst the same was plying for hire in the public streets of Liverpool, and removed and carried away and sold the same, contrary to the Bills of Sale Act (1878) Amendment Act, 1882; and also that the defendants wrongfully detained and converted the goods to their own use. At the trial it was admitted that default had been made in payment of the instalments, and it

appeared that the defendants had taken possession of the horse, cab, and harness, while standing in a public street, and had removed them to premises in the occupation of defendants, and had, after the expiration of five days from the date of seizure, sold the goods. The contention between the parties was as to the legality of the seizure in the street.

The assessor gave judgment for the defendants on the grounds that there was an admitted default and there was no prohibition against seizing in the street, and as the property was seized in the street the 13th section of the Bills of Sale Act, 1882, did not apply. "Premises" could not mean the public street; to keep the cab in the street would have been a public nuisance: *Rex* v. *Russell* (1); and there was no statement of claim under s. 13 for wrongful removal. He gave leave to move.

F. Dodd, for the plaintiff, moved that the judgment for defendants be set aside, and for a new trial. First, the seizure being made in the public street was illegal and contrary to s. 13 of the Bills of Sale Act (1878) Amendment Act, 1882; secondly, the seizure was illegal and void by reason of the removal by the defendant company of the horse, cab, and harness within five days from the seizure to the premises of the defendant company contrary to s. 13. (2)

Harmsworth, for the defendants, shewed cause. The claim is to recover damages for a trespass, and no damage is found. The provision in s. 13 is mere procedure, and non-compliance with it is only an irregularity. A reasonable construction must be put on the section. It was practically impossible to let the horse and cab remain for five days in the street.

F. Dodd, in support of the motion. No doubt the horse and cab could not be kept in the street. But, that being so, they should not have been seized there, or they should have been taken to the plaintiff's premises, or to those of a third person, and not to

(1) 6 East, 427.

(2) By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13, all personal chattels seized or of which possession is taken under or by virtue of any bill of sale, "shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

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the premises of the defendants. The object of the enactment is to prevent the grantee of the bill of sale taking away the goods until five days have elapsed.

DENMAN, J. The substance of this case seems to be that there were certain chattels belonging to the plaintiff which were the subject of a bill of sale, and at the time when they became liable to be seized under it they were in the public street, and possession was taken of them in the street, and they were removed to a yard and remained there beyond five days from the date of possession taken. The plaintiff urges that this was contrary to the Bills of Sale Act, 1882, and was an illegality or irregularity which enabled him to claim damages even in the absence of proof of any damage being sustained. I think that is not the effect of s. 13 of the Bills of Sale Act (1878) Amendment Act, 1882, and that the learned assessor was right in so deciding. I think it is impossible to apply that section for all intents and purposes to the case where goods liable to be seized are taken possession of in a public highway which is not the property of the individual to whom the goods belong nor the property of the person who takes them. The bill of sale does not so restrict the right of seizure, and the restriction, if any, must be implied from the terms of the Act. The goods were not sold until after five days, and it appears to me that except it were proved that there was some damage to the plaintiff by reason of what was done, no action will lie. There is nothing I think to prevent seizure of the goods in the place where they may be found, and there can be nothing which compels a person to keep the goods in a place where there is no authority to keep them. The result is that the section must be construed reasonably, and that if the goods are seized in a place where they are not prevented from being seized the grantee may exercise his right. He must take possession of them and put them in a place where they can reasonably be kept, with notice to the person to whom they belong where they are, and that they will remain until five days during which they will not be sold, and that then they will be sold, and if at the expiration of those days the goods are sold no action will lie. The learned assessor was correct in his view. Obviously he thought there was no evidence of damage.

WILLS, J. I am of the same opinion. The statement of claim seems to have been designedly framed so as to be ambiguous. In one part it does distinctly rely on the irregularity in question; it treats it as a specific ground of complaint, but at the trial the counsel for the plaintiff appears to have said that he was not proceeding for that irregularity—as of course he was not, for no damage was claimed in respect of the sale—more than five days having elapsed from the seizure—but he attempted to call in aid the old technicality of the *Six Carpenters' Case*. (1) I doubt much whether under the strictest doctrine of the common law this is a case to which the *Six Carpenters' Case* (1) applies. I understand the principle of it to be that if there is authority given by common law or statute law, that authority must be strictly pursued, and, if it is not, then the person who fails to pursue it in all its detail may be made liable as a trespasser ab initio. In the present case the authority under which the defendants were acting was a right to seize, and it was neither part of the common law nor of statute law that that seizure should be coupled with any incident as suggested in this case. There was a specific proviso that after the seizure was made certain things should be done which could not be done until after seizure. I cannot think that is such a limitation of the right of seizure or such a necessary coupling by statute of other incidents to that right as to make the *Six Carpenters' Case* (1) applicable at all. But even if it were so, I should still think the assessor right, and that it is impossible to apply s. 13 of the Bills of Sale Act, 1882, to such a case as this. The cab could not remain for five days in the open street, and to say that it should not be removed until five days after seizure in the open street would be absurd. It is quite clear that this case was not contemplated by the Act, and if so the Act ought not to be treated as applicable.

The case is quite exceptional and no practical difficulty will arise from our decision of it.

Appeal dismissed with costs.

Solicitors for plaintiff: *Bell, Brodrick, & Gray.*

Solicitors for defendants: *J. & R. Gole.*

J. R.

(1) 8 Co. 146, a.

1886
April 16.

[IN THE COURT OF APPEAL.]

EX PARTE WHINNEY. IN RE GRANT.

Bankruptcy—Scheme of Arrangement—Discovery of Debtor's Property—Power to summon Witnesses for Examination—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 27, 168.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27—which enables the Court on the application of the trustee to summon before it for examination the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, &c.—does not apply to the trustee under a composition or scheme of arrangement which has been duly approved by the Court under s. 18 of the Act.

APPEAL from an order made by Mr. Registrar Brougham, discharging without examination several persons who had been summoned for examination under s. 27 of the Bankruptcy Act, 1883.

The debtor filed a bankruptcy petition on July 6, 1885, and on the same day a receiving order was made against him. The first meeting of the creditors was held on July 28, when it was resolved by the proper statutory majority to accept a scheme proposed by the debtor for the arrangement of his affairs. This scheme provided that all the property of the debtor divisible among his creditors should be assigned by deed to a trustee for the benefit of his creditors, upon terms specified in the resolution, and that, subject to the resolution, the property of the debtor should, as nearly as might be, be administered according to the law of bankruptcy, and particularly Part III. of the Bankruptcy Act, 1883; and that Frederick Whinney should be appointed trustee under the deed, to administer and realize the debtor's property. The resolution was duly confirmed by the creditors at their second meeting, and the scheme was afterwards approved by the Court. An order was made rescinding the receiving order, in accordance with the provisions of r. 163 of the Bankruptcy Rules, 1883. A deed to carry out the scheme was duly executed. Upon the application of the trustee of this deed subpœnas were issued, under s. 27, for the attendance of several persons for examination.

Upon the attendance of these persons in obedience to the subpœnas, the objection was taken that the Court had no jurisdiction under s. 27 to issue the subpœnas upon the application of the trustee of such a deed. The Registrar held that the objection was well founded, and discharged the witnesses without examination.

The trustee of the deed appealed.

Bigham, Q.C., and *Sidney Woolf*, for the appellant. The jurisdiction given by s. 27 can be exercised, not only on the application of the trustee in a bankruptcy, but also on the application of the trustee of a deed executed to carry out a scheme of arrangement under the provisions of s. 18. (1) The word "trustee" in

(1) Sect. 18 provides for the acceptance by the creditors of a scheme proposed by a debtor for the arrangement of his affairs, but that the scheme shall not be binding unless it is approved by the Court.

Sub-s. 10 provides: "The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested."

Sub-s. 11: "If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme."

Sub-s. 12: "If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms 'bankruptcy,' 'bankrupt,' and 'order of adjudication' included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and an order approving the composition or scheme."

Sub-s. 13: "Part III. of this Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words 'trustee,' 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' as in the last preceding sub-section."

Sect. 27, sub-s. 1: "The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property."

Sect. 168, sub-s. 1 provides that "in this Act unless the context otherwise requires (inter alia) 'trustee' means the trustee in bankruptcy of a debtor's estate."

Rule 163 of the Bankruptcy Rules,

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s. 27 includes the trustee of such a deed. It is just as necessary that he should be able to take steps for the discovery of the debtor's property as it is that a trustee in bankruptcy should be able to do so. And the deed in this case expressly provides that the debtor's property shall be administered as in bankruptcy. The context requires that the word "trustee" in s. 27 should not be restricted to a trustee in bankruptcy. After the Court has approved of a scheme its jurisdiction is not at an end. Under sub-s. 10 of s. 18 it has power to enforce the provisions of the scheme, and in certain cases it has power under sub-s. 11 to annul the scheme, and adjudge the debtor a bankrupt.

It is said that s. 27 does not apply to a scheme, because, by sub-ss. 12 and 13 of s. 18, Parts V. and III. of the Act are expressly made to apply to a scheme, and s. 27 occurs in Part I. of the Act. But s. 27 speaks of "the debtor," it is not limited to a bankrupt. This shews that the word "trustee" in that section was not intended to be restricted to a trustee in bankruptcy. And s. 27 is one of a series of sections (24—27) which is headed "control over person and property of debtor."

[*Swinfen Eady*, for the persons summoned. The registrar considered that the case was governed by *In re Hewitt.* (1)]

That case is distinguishable. There the Divisional Court held that s. 27 does not apply to an administration in bankruptcy, under s. 125, of the estate of a deceased insolvent. But, in proceedings under s. 125, no receiving order is made, and s. 27 does not come into operation until after a receiving order has been made against a debtor, i.e., against a living man. It is clear that s. 29, which is in Part I. of the Act, must apply when there is a scheme of arrangement. It provides that in certain cases of marriage settlements, "if the settlor is adjudged bankrupt, or compounds or arranges with his creditors, the Court may refuse or suspend an order of discharge, or grant an order subject to conditions, or refuse to approve a composition or arrangement, as

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1883, provides, "When a composition or scheme is sanctioned, the official receiver shall forthwith put the debtor (or, as the case may be, the trustee under the composition or scheme) into possession of the debtor's property. The Court shall also rescind the receiving order."

(1) 15 Q. B. D. 159.

the case may be, in like manner as in cases where the debtor has been guilty of fraud." If s. 27 does not apply to a trustee under a composition or scheme, such a trustee will not have the means, which a trustee in bankruptcy has, of procuring evidence to enable the Court to exercise the power conferred by s. 29.

Swinfen Eady, for the persons summoned, was not heard.

Lord Esher, M.R. It is clear from sub-s. 12 of s. 18 that the trustee under a scheme of arrangement is not, in that part of the Act at all events, considered as a trustee in a bankruptcy; he is in terms distinguished from a trustee in a bankruptcy. Primâ facie, therefore, he is not a trustee in a bankruptcy. By virtue of s. 18 certain parts of the Act, Parts III. and V., are to apply to a scheme under that section; primâ facie, therefore, the other parts of the Act, Part I. for instance, are not to apply to such a scheme. The trustee under a scheme of arrangement is distinguished in s. 18 from a trustee in a bankruptcy, but for some purposes he is to be treated as if he were a trustee in a bankruptcy. Then s. 27, which occurs in Part I., says that "The Court may on the application of the official receiver or trustee" summon before it certain persons. What is the meaning of the word "trustee"? s. 168 says that: "'Trustee' means the trustee in bankruptcy of a debtor's estate, unless the context otherwise requires." The context there spoken of is, of course, the context which surrounds the word "trustee" in any part of the Act where you find it, and, therefore, you must look to s. 27 in order to see whether the context requires that, instead of including only a trustee in a bankruptcy, the word "trustee" should include also a trustee who, by the Act itself, is not a trustee in a bankruptcy but a trustee under a scheme. So far from the context of s. 27 requiring that the word should include a trustee under a scheme, it seems to me that every provision of it applies only to a trustee in a bankruptcy, and not to a trustee under a scheme.

But some difficulties have been pointed out as resulting from this construction. It is said that, unless this power is given to the trustee under a scheme, he would not have the necessary means of discovering the estate of the debtor. This difficulty is not sufficient to shew that the context "requires" that the word

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"trustee" should include the trustee under a scheme. But I think the difficulty will vanish if you consider that, after a receiving order is made and the official receiver appointed, a considerable period must elapse before a scheme is agreed to, and still more before it is approved by the Court. And during that period I should think that the official receiver could make use of s. 27. So that the difficulty suggested comes to this, that the creditors should not adopt a scheme and allow the Court to approve of it, until they have ascertained all the property and all the liabilities of the debtor. If, without this knowledge, they choose to agree to a scheme, they must take the consequences. It is their agreement and the approval of the Court which make the scheme binding, and they ought to take care to get everything in order before they agree to the scheme or allow it to be approved by the Court. The context of s. 27 does not require that the word "trustee" in it should be read as including the trustee of a scheme, therefore we have no authority to insert those words. And we cannot speculate upon what was the intention of the legislation, otherwise than as it appears in the Act.

LINDLEY, L.J. I am of the same opinion. The registrar has, I think, placed the proper construction upon s. 27. The application was made by the trustee under a scheme which has been approved by the Court in the ordinary course. I am not disposed to say that it would not be useful if s. 27 could be invoked by such a trustee. But we must see whether it is applicable to him. Now by s. 168 we must construe the word "trustee" in s. 27 as meaning "the trustee in bankruptcy of a debtor's estate," unless the context otherwise requires. The right way to test that is, to strike out the word "trustee" in s. 27, and insert the expression "trustee in bankruptcy of a debtor's estate," and then see if there is any difficulty in so reading it. Testing the language in that way, I do not see that there is any difficulty in giving effect to s. 27.

It is suggested that sub-s. 10 of s. 18 enables us to make the order, but I think that, on any fair construction of the words of that sub-section, this is not an application to enforce the scheme. Then, further, sub-ss. 12 and 13 of s. 18, make Parts III. and V.

of the Act apply to a composition or scheme, and those parts do not include s. 27. Again, and this seems to me to exhaust the whole case, if any difficulty should occur in working the scheme, by reason of the trustee not being able to ascertain what is necessary to enable him to get in the debtor's estate, if the whole scheme should come to a dead lock, and will not work, the proper course will be for the trustee to apply to the Court under sub-s. 11 to annul the scheme, and adjudge the debtor bankrupt. It appears to me impossible, either from the language or by any inferential process of reasoning, to come to the conclusion that the word "trustee" in s. 27 has any other meaning than that which is given to it by s. 168. I think, therefore, that the appeal ought to be dismissed.

LOPES, L.J. The question is, does the word "trustee" in s. 27 include the trustee under a scheme of arrangement agreed to under s. 18?" Now s. 168 defines the word "trustee" as meaning "the trustee in bankruptcy of a debtor's estate, unless the context otherwise requires." I can see nothing in s. 27, which requires that any interpretation should be given to the word different from that which is given to it by s. 168; indeed, I think the whole of the context leads to the conclusion that that is the meaning which ought to be given to it in s. 27. Then s. 18 expressly makes Parts III. and V. apply to a composition or scheme, and nothing is said about s. 27. Therefore, I take it that the maxim expressio unius exclusio alterius applies. I think the legislature deliberately used the word "trustee" in s. 27 in the meaning given to it by s. 168, and that they did so from a desire to limit as far as possible the expense of carrying out a scheme of arrangement.

Solicitors for appellant: *Michael Abrahams, Son, & Co.*
Solicitors for respondents: *Drake, Son, & Parton.*

W. L. C.

1886
March 26, 27;
April 16.

[IN THE COURT OF APPEAL.]

EX PARTE REED AND BOWEN. IN RE REED AND BOWEN.

Bankruptcy—Scheme of Arrangement—Approval of Court—Wishes of Creditors—Duty of Trader as to keeping Accounts—Official Receiver—Appearance on Appeal—Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28.

In determining whether to approve a scheme of arrangement of the affairs of a debtor, which has been accepted by his creditors under the provisions of s. 18 of the Bankruptcy Act, 1883, the Court must form its own judgment whether the terms of the scheme are reasonable or calculated to benefit the general body of creditors, and must not be influenced by the wishes of the majority of the creditors.

If the registrar has refused to approve of such a scheme, the Court of Appeal will not reverse his decision unless it is satisfied that he has exercised his discretion wrongly.

In order that a trader may fulfil the requirements of sub-s. 3 (*a*) of s. 28 of the Act, his books must be kept in such a way as to shew at once, without the necessity of a prolonged investigation by a skilled accountant, the state of his business.

As a general rule, and in the absence of special circumstances, the official receiver ought not to appear upon the hearing of an appeal, unless he is required to do so by the Court, and, if he appears unnecessarily, he will not be allowed any costs. He is not justified in appearing merely to defend his report.

APPEALS from the refusal of Mr. Registrar Hazlitt to approve of a scheme of arrangement of the affairs of the debtors, which had been accepted by resolutions passed by the statutory majority of their creditors.

The debtors, J. L. Reed and E. C. Bowen, were contractors, and were engaged in carrying out large contracts for the construction of railways in Brazil, and elsewhere.

On the 17th of April, 1885, a receiving order was made against them on the petition of a creditor.

At the first meeting of the creditors on the 2nd of September, 1885, a special resolution was passed accepting a scheme proposed by the debtors for the arrangement of their affairs, and this resolution was confirmed at another meeting on the 8th of January, 1886. The debtors applied to the Court for the approval of the scheme, and the official receiver made a report to the Court, the material parts of which were as follows:—

"The debtors submitted an amended statement of and in relation to their joint affairs on the 4th of November, 1885.

"The liabilities expected by the debtors to rank against their estate appear by the said statement to amount to 152,488*l.* 4*s.* 7*d.*

"The assets appearing by the same statement as available for the payment of unsecured creditors, after deducting the claims of preferential creditors, were estimated by the debtors to produce 22,067*l.* 13*s.* 4*d.*

"The debtor J. L. Reed has filed a statement of affairs of his separate estate, shewing liabilities unsecured 317*l.* 13*s.* 6*d.*; assets, nil.

"The debtor E. C. Bowen has also filed a statement of his separate estate, which shews as follows:—Liabilities not expected to rank 1051*l.*; assets, nil.

"At the first meeting of the creditors, duly summoned and held on the 2nd of September, 1885, a special resolution was passed by the creditors, entertaining the following proposal by the debtors, viz.:—

"(1.) That all the property of the debtors, joint as well as separate, divisible amongst their creditors, vest in a trustee for the benefit of their creditors, but if the debtors shall have entered into any contracts which the trustee and committee of inspection considered should not be assigned, but be held in trust by the debtors, or either of them, for the benefit of the creditors, then that the same shall not be assigned, but the debtors, or such one of them as may be necessary, shall execute a declaration of trust in proper form for the benefit of the creditors, or for the trustee on their behalf, in respect of such contracts, and that, subject to these resolutions, the said property of the debtors shall, as nearly as may be, be administered by the said trustee under the control of a committee of inspection according to the law of bankruptcy, and particularly Part III. of the Bankruptcy Act, 1883.

"(2.) That there shall be a committee of inspection for the purpose of superintending the administration and the realization of the debtors' property by the trustee, and that the provisions of the Bankruptcy Act, 1883, relating to committees of inspection do, in so far as applicable, apply to such committee.

"(3.) That the debtors shall assist in every possible way in

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the administration and realization of their property, and the distribution of the proceeds amongst their creditors.

"(4.) That the trustee may make an allowance to the debtors of a percentage on all sums received by him, at such a rate as the committee of inspection shall fix.

"(5.) That all debts directed by the Bankruptcy Act, 1883, to be paid in priority to other debts shall be so paid.

"(6.) That all costs, charges, and expenses (including those of the debtors' solicitors) of and incidental to the proceedings in this matter and to the suspension of payment by the debtors, and the investigation of their affairs, and of this and the subsequent meetings of their creditors, and generally in relation to the affairs of the debtors, and the preparation of the scheme of arrangement, and the obtaining the approval of the Court thereto, shall be taxed and paid by the trustee.

"(7.) That the costs, fees, and charges of the official receiver (if any) shall be retained by him out of any moneys in his hands, or shall be paid by the trustee (if such moneys shall be insufficient for that purpose) out of any moneys received by him as such trustee.

"(8.) That with a view of paying in full the debts provable under these proceedings, each of the debtors will set apart in each year, for a period of three years from the date of the confirmation of this scheme by the Court, for the benefit of the creditors, one third part of his net annual earnings realized, until the creditors shall receive payment in full of the debts due to them respectively, and the trustee shall distribute the same amongst the creditors in the shape of dividends, in the same manner as if the same had been realized from the property assigned. The trustee shall have a right to audit the books of the debtors, and each of them half-yearly, until all the creditors shall have received payment in full of their respective debts, but he shall not at any other time or in any other way control, molest, or interfere with either of the debtors, or any business either of them may undertake or transact. That in the event of any securities, cash, or other assets remaining with the trustee after payment in full of all the debts due to the creditors, the surplus so remaining shall belong to and be paid over or transferred to the debtors."

There were other resolutions appointing a trustee and a committee of inspection.

The report continued:—

"The public examination of the debtors was concluded on the 6th of November, 1885.

"At a subsequent meeting of creditors duly summoned, and held on the 8th of January, 1886, the aforesaid scheme of arrangement was confirmed by the statutory majority of the creditors.

"The gross amount of the assets is 22,353*l.*, as estimated by the debtors in their statement of affairs.

"And, having regard to s. 18, sub-ss. 5 and 6, the official receiver reports:—

"That the debtors are contractors; that the debtor Reed states that in 1879 the present firm of Reed, Bowen, & Co. was formed, their capital consisting of railway bonds of the value of 82,500*l.*, which apparently subsequently realized 49,646*l.*

"The books of account produced by the debtors are very imperfect. There are no expenses accounts, or accounts of the partners' drawings, and, although it is possible that the items of these accounts are recorded in the cash books produced, yet, by reason that the entries in the cash books have not been posted, such items cannot be ascertained without great difficulty.

"No ledger has been produced, nor any accounts shewing the sums owing to the creditors named in the statement of affairs. No book containing any capital account has been produced; the only document purporting to be an account is a sheet of paper shewing the sum of 49,646*l.* 1*s.* 7*d.*, as the amount realized from the nominal capital of 82,500*l.*, as hereinbefore mentioned, but there is no account of the manner of disposal of the said sum.

"It appears from the securities book produced that in July, 1884, the debtors were possessed of 19,900*l.* Sherbrook Mining Company's bonds, and of 10,000*l.* ($50,000) Utica and Ithaca Railway certificates, making together property of the nominal value of 29,900*l.* These securities are not mentioned or referred to in the debtors' statement of affairs, and there is no account whatever in the debtors' books of the way in which such securities have been disposed of.

"The official receiver therefore reports that the books of ac-

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count produced by the debtors do not sufficiently disclose their business transactions and financial position within the three years preceding the date of the receiving order.

"The debtors have for some time past been in financial difficulties.

"The debtor J. L. Reed states in his public examination that during the last three years the firm had not been able to conduct their business so as to provide any profit, and in June or July, 1884 (as appears from the preliminary examination of the said J. L. Reed), the debtor's furniture was seized and sold under an execution. Nevertheless the debtors continued to carry on business and contracted debts, and amongst others a sum of 1773*l.* for salaries and wages, up to the date of the receiving order.

"The official receiver therefore reports, that the debtors continued to carry on business after knowing themselves to be insolvent.

"The assets which will vest in the trustee under the proposed scheme of arrangement consist wholly of a surplus from a security in the hands of a secured creditor, namely, an estate in North Brazil, valued by the debtors at 52,353*l.*, and mortgaged for 30,000*l.* As admitted by the said J. L. Reed in his public examination, there are no available assets whatever at the present moment. So far as regards the contracts upon which the debtors rely to discharge their liabilities, it is stated in the public examination that is uncertain how the same will turn out.

"In the face of the facts that twenty-four petitions in bankruptcy have been presented against the firm since July, 1883, and the debtors' furniture has been seized and sold as aforesaid, it does not appear how the debtors will be in a position to carry out the said contracts. There is no undertaking on the part of the secured creditors that they will refrain from realizing their securities as soon as a favourable opportunity may arise, nor any evidence of the present or probable future value of the same securities.

"The official receiver further reports that there is no evidence whatever to shew the probable amount of the net earnings of which the debtors propose to set apart one third part for their

creditors during the next three years, nor any evidence that any sum will be earned by them or either of them.

"Under these circumstances the official receiver is unable to report that the creditors will receive any dividend whatever from that proposal, nor is he able to report that the said scheme of arrangement is reasonable and calculated to benefit the general body of creditors.

"Save as aforesaid the official receiver is not in possession of any evidence tending to prove that the debtors, or either of them, have or has committed any misdemeanor under the Bankruptcy Act, 1883, or Part II. of the Debtors Act, 1869, or any amendment thereof, or tending to prove any of the facts mentioned in s. 28, sub-s. 3, of the Bankruptcy Act, 1883."

Some evidence was adduced before the registrar. He refused to approve the scheme.

The debtors appealed, and a second appeal was presented by some of the assenting creditors.

Winslow, Q.C., and *Herbert Reed*, for the debtors. The Court has, no doubt, under s. 18 a discretion as to approving a scheme to which the creditors have by the proper majority agreed, but it is a discretion which ought to be exercised in the interest of the creditors and with a regard to their wishes. They, as men of business, are best able to judge what will be for their benefit. In the present case the only chance of the creditors getting anything is by means of the scheme. If the estate is wound up in bankruptcy, the contracts with foreign governments will be forfeited. These are valuable contracts, and likely to result in a large profit if they can be carried out. Creditors whose debts amount to 130,000*l.* are in favour of the scheme.

The offences mentioned in s. 28 which the debtors are reported to have committed are only the omission to keep proper books of account and the continuing to trade after they knew that they were insolvent. In the case of a bankruptcy the Court would not for such comparatively trivial offences inflict a greater punishment than a suspension of the order of discharge for three months, and s. 18 does not compel the Court to refuse to approve

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a scheme when only such offences have been committed; it only gives the Court a discretion to refuse to approve the scheme.

As to the omission to keep accounts, the evidence shews that the debtors kept a ledger at each place where they were carrying on a contract in relation to that contract. These books may not have been completely posted up, but the state of their affairs could be ascertained without much difficulty.

As to the continuing of their business, contractors cannot be bound to stop their business the moment they find that their contracts are not bringing in a profit. On contracts of this kind the profit does not come in until the completion.

Cooper Willis, Q.C., for the second appeal. Sects. 18 and 28 taken together are a modification of s. 28 of the Bankruptcy Act, 1869, which was construed by this Court in *In re Durham.* (1) The intention was to give the Court a general discretion, but at the same time to leave large powers in the hands of the creditors. Regard should be had to the wishes of the creditors. The terms of a scheme which is calculated to benefit the general body of creditors—and that must be the effect of the present scheme, since it is clear that the creditors will get nothing if there is a bankruptcy—cannot be unreasonable.

Bigham, Q.C.; R. Vaughan Williams; and *J. F. Rubie;* for other creditors who approved of the scheme.

Yate Lee, for the petitioning creditor; *Sidney Woolf,* for other creditors opposing the scheme; and *Muir Mackenzie* and *Arnold White,* for the official receiver; were not heard.

LORD ESHER, M.R. A great deal has been said about the opinion of a large majority of the creditors, and the case has been argued much as it might have been if the Bankruptcy Act of 1883 had never been passed.

In my opinion this Act was passed because it had been proved to the satisfaction of the legislature that a majority of creditors, however large, was not careful, and was not to be trusted: that on the contrary, the creditors were generally utterly careless, that they wrote off their debts as bad, and agreed to terms which might give some possibility—an evanescent chance—of their

(1) 16 Ch. D. 623.

getting something out of the wreck. It was because of the known and proved behaviour of creditors with regard to their insolvent debtors that this Act was passed, taking away from the majority of creditors that power which they had so recklessly and carelessly used, and putting a controlling power into the hands of the Court for the purpose of protecting the creditors against their own recklessness; for the purpose of preventing a majority of creditors from dealing thus recklessly, not only with their own property, but with that of the minority, and of enforcing, so far as the legislature could, a more careful and moral conduct on the part of debtors.

This being the object of the legislature, let us see what means they have taken to carry it into effect. They have appointed an official receiver, and have directed him to make a report to the Court as to the terms of any proposed composition or scheme, and as to the conduct of the debtor, and any objections made by any creditor, which report is to be primâ facie evidence of the statements contained in it. That is giving him immense powers, and for what purpose? In order that the Court might not be forced, as it had formerly been, to rely upon the view of the majority of the creditors, in other words, to protect the Court from the very argument which has been so much insisted upon to-day.

Further, in order to carry out this view of the legislature as against this reckless conduct of creditors, they have imposed on the Court the duty of approving the composition or scheme, to which the creditors or the great majority of them have agreed. It is not to be sufficient that the creditors are satisfied with the scheme; notwithstanding the agreement of the majority of the creditors the Court must also approve of the scheme.

How is the Court to exercise this jurisdiction? If the Court is of opinion that the terms of the scheme are not reasonable, or are not calculated to benefit (not the creditors who have agreed to them, but) the general body of creditors, then "the Court shall refuse to approve the scheme," although it has been agreed to by the creditors. And, although the scheme has been agreed to by the creditors, and although the terms of it might be reasonable, so far as the creditors are concerned, and calculated to benefit the general body of creditors, yet, for the guarding of the

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morality of trade, if the case be one in which the Court would be required, if the debtor had been adjudged bankrupt, to refuse his discharge, "the Court shall refuse to approve the scheme."

And, still further, not for the benefit of the creditors after the insolvency, but in order to protect the morality of trade, if any such facts are proved, as would, under the Act, justify the Court in refusing, qualifying, or suspending the debtor's discharge, if he had been adjudged bankrupt, the Court may, in its discretion, not impose new terms, but refuse to approve the scheme.

Now what is the state of facts to which this law is to be applied in the present case? These debtors, before their bankruptcy, had entered into large and onerous contracts with, and had obtained concessions from governments in South America, which, if successful, would probably have brought in large profits; but misfortunes have happened; and the result has been that twenty-four bankruptcy petitions have been presented against the debtors. Stronger evidence of the difficulties in which they were placed cannot be well conceived, and, judgment having been obtained against one of them, his position was so desperate that the amount could not be paid and the furniture of his house was seized. These large contracts in America must require large expenditure in order to fulfil them, must require large capital in hand in order to carry them on with success; and, instead of having that capital, the debtors are reduced to a position so bad that it is impossible for any man of business to conceive that they have either means or credit. It was suggested that by reason of the value of the contracts in Brazil they could raise money in London. One naturally asks, is there anyone who will come before the Court, and not merely give a shadowy opinion that in the city of London these persons could get credit, but who will pledge his oath that he himself is ready to advance them money? Certainly not. Therefore there are these large contracts, but the contractors have no means, in hand or in credit, to carry them out. Then what is the scheme? They are to be allowed to carry out these contracts. If this scheme is approved they are immediately made masters of the mode of carrying them out, and then they offer to set by a certain amount each year for three years of the net profits. The official receiver says that

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there is no evidence whatever to shew the probable amount of the net earnings of which the debtors propose to set apart one-third part for their creditors during the next three years, nor any evidence that any sum will be earned by them, or either of them. He is quite right, there is not a tittle of evidence to shew it. On the contrary, the business inference is that, even if they could carry on the contracts, the first three years would be onerous to them, and there would not be any net profits at all. Under these circumstances the official receiver says that he is unable to report that the creditors will receive any dividend whatever from the proposal. It seems to me that this is a good objection; I cannot see any reasonable prospect of a dividend. "Nor is he able to report that the scheme of arrangement is reasonable, or calculated to benefit the general body of creditors." This is a submission to the Court. And, taking these facts into consideration, that this scheme is to hand over to, or rather to leave in, the hands of the debtors the sole control of the mode in which these burdensome contracts are to be carried out, considering their position and means, and what they must require in order to carry out these contracts, can the Court be of opinion that the terms of the scheme are reasonable? To my mind they are wholly unreasonable. And, if it is not a reasonable scheme, it certainly is not one calculated to benefit the general body of creditors. What is there to shew that any benefit will come to the creditors? I agree with the official receiver that there is no reasonable prospect of anything coming to the creditors by means of it. Therefore it is not calculated to benefit the general body of the creditors. If so, the registrar was right in refusing to approve of the scheme.

But, supposing that is going too far (and I am only assuming it for the purpose of shewing that there are other grounds), I come to the discretionary power of the Court. What, again, is the state of things? To my mind it is clearly made out that these contractors traded in the most reckless and careless and improper manner, and were guilty of improper conduct as traders. To my mind they have committed that, not slight, but serious, offence against trading morality, which is struck at by subs. 3 (*a*) of s. 28 of the Act; they have failed to keep usual books of

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account in an ordinary and proper and business way. They have hardly kept any books at all. They had no proper ledger. To say that they had a ledger at each place at which they were carrying out a contract is to my mind idle. That is not the ledger which is required. The ordinary duty of contractors, whose business it is to carry on contracts at many different places, is to have at their head place of business books which will shew, not the result of each contract, but the result of all their contracts. A ledger should contain not the account of one work or the dealing with one person, but an account of all the business. There is not a symptom of these debtors having ever had such a ledger. There is nothing in any book which could shew them what was the state of their business with regard to all their contracts. Their cash-books were not worked up in the ordinary way, and were not in a state to shew to anybody, or to themselves, what was the state of their business. The way in which such books should be kept has been often enunciated by the Court. It is not enough that there should be books with entries in them which would require a prolonged examination by a skilled accountant in order to ascertain the result of them. That is not keeping proper books. The books should be properly kept and balanced from time to time, so that at any moment the real state of the trader's affairs may at once appear. Those are the books which traders ought to keep. There is not a symptom that these debtors have kept such books; on the contrary, there is strong evidence from the statement of the official receiver, which is not contradicted by any evidence brought before us, that their books were not kept in anything like the proper and ordinary mode in which business men keep their books. It has been suggested that this is a slight offence. It is not a slight offence. It is a serious offence, and one for which in the case of a bankruptcy some punishment would have been inflicted on the debtors, although not possibly the punishment of refusing them their discharge. But it is a serious offence which must be met with punishment.

Again, did the debtors continue to carry on business after they knew that they were insolvent? What are the facts? They had these heavy burdensome contracts which could not be carried out

unless they had means; they have had this enormous body of bankruptcy petitions presented against them, to which, as it appears to me, they had no answer; they had an execution put in which they could not meet, and were obliged to allow their very furniture to be seized. Would any man of business venture to say that the seizure of a man's furniture is not the last symptom of insolvency? They were clearly insolvent, and they knew it, and it is a serious offence to carry on business after that. Taking all the facts together (for you must not take one thing alone), has their conduct been that of good and careful traders? They have been guilty of offences under the 28th section; and those offences are strong to shew that they are not persons who ought to be trusted, in the way in which the scheme would trust them, to carry on business. Therefore, not only are there offences proved which justify the registrar in refusing to approve this scheme, but the Court ought to refuse to approve the scheme on this ground also, that it would trust with the control of the business persons who have shewn themselves utterly unworthy to be trusted to carry on any business with reasonable care and attention. I think for every reason the Court ought to exercise the power given to it by the statute, and is bound to say that the scheme ought not to be approved. The appeal must be dismissed.

Lindley, L.J. The registrar has declined to approve this scheme, which has the support of a considerable number of the creditors. According to the figures which I have taken down, there are creditors for about 131,000*l.* who support it, and creditors for about 20,000*l.* who oppose it.

The first point is, whether the scheme is, in itself, a reasonable scheme, or calculated to benefit the general body of creditors. I understand the majority of the creditors are of opinion that it is the only chance they have of getting anything. But the official receiver says that it does not appear how the debtors will be in a position to carry out their contracts. That struck me when I first read the scheme. It appeared to be a reasonable scheme, provided there was any method of carrying it out, but I fail to see any reason to suppose that it can be carried out. There is no money forthcoming; no probability of benefit to the creditors

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from the scheme as it stands; and there is nothing whatever to shew that the foreign governments would allow the contracts to go on. I do not call it a reasonable scheme.

The registrar has also found that the debtors have not kept proper books. That is a matter of conduct, and the Act of 1883 makes the conduct of the debtor a matter of extreme importance. Sect. 18, subs. 5, says that "the Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme"; that is, as to its reasonableness or practicability and so on. That is a matter upon which the Court might possibly be guided very much by the view of the creditors. But that is not all. The Court is to hear a report "as to the conduct of the debtor"; that is a matter of a very different character. Therefore the Court has to take into consideration, quite apart from what the creditors think of a proposed scheme, how the debtor has been carrying on his business, and, if the Court is of opinion that the conduct of the debtor has been such that it ought not to approve of the scheme, it is the duty of the Court to refuse to approve of it.

Now these debtors have not kept their books in such a way as, in a business sense, to shew their financial position. Though there may be in their books an undigested mass of figures from which, I suppose, it may be possible to find out something about the condition of their business, yet there has been no keeping of proper books in a business sense; they have not kept such books as they ought to have kept, and that is a very serious offence.

The official receiver also reports that they have continued to carry on business, and incur debts, notwithstanding their insolvency, and their knowledge of it. The fact that they did not keep proper books may account to some extent for their ignorance of their position; but the knowledge of their real position was forced upon them in a very unmistakable way by having twenty-four bankruptcy petitions presented against them, and by the furniture of one of them being seized under an execution; and yet, knowing in this way their position, they continued to carry on their business. Under these circumstances I think the learned registrar came to a proper conclusion, and that this scheme ought not to be approved by the Court.

LOPES, L.J. The material sections of the Bankruptcy Act of 1883 are ss. 18, 28. What were the objects of the legislature in passing those two sections? Putting it shortly, I think the objects were these, to protect a prudent minority of creditors against a reckless majority, and also to protect the reckless majority against themselves. How did the legislature propose to carry out these objects? By placing in the Court a controlling supervision, and sub-s. 5 of s. 18 shews how that controlling supervision is to be exercised. It says, "The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor." Therefore, not only have the terms of the composition or scheme to be considered, but also the conduct of the debtor.

Now in the present case the official receiver has reported against both the terms of the scheme and the conduct of the debtors. The report afterwards came before the registrar, and he has refused to approve the scheme. What would justify this Court in reversing his decision? Nothing, I think, except the feeling that he has wrongly exercised his discretion. The facts have been already fully dealt with, and I need only say that, having regard to those facts, and to the evidence which was before the registrar, I do not think that he has exercised his discretion wrongly; on the contrary, I think he has exercised it rightly. In my opinion his decision ought to be upheld.

Yate Lee, for the petitioning creditor, asked for his costs.

LORD ESHER, M.R. Only one set of costs will be allowed to the opposing creditors.

Arnold White, for the official receiver. The official receiver is entitled to costs. He was served with notice of the appeal, and it was necessary for him to appear because his report was impeached.

[LORD ESHER, M.R. He need not defend his report.]

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At any rate he should have his costs out of the deposit on the appeal: *Ex parte Campbell.* (1)

Winslow, Q.C., for the debtors. The notice of appeal which was served on the official receiver expressly stated that no relief would be asked against him. In the absence of special circumstances the official receiver ought not to appear on the hearing of an appeal: *Ex parte Dixon.* (2)

Arnold White, in reply.

LORD ESHER, M.R. The Court has already said that it will not encourage the appearance of unnecessary parties at the expense of a bankrupt's estate. The official receiver is an officer of the Court; when he has made his report his duty is at an end. As a general rule he ought not to appear on the hearing of an appeal, unless the Court requires him to do so, in which case his costs will be provided for. He should not appear as a volunteer except under very special circumstances. There are no such circumstances in the present case. He ought not to have appeared, and we cannot allow him any costs.

LINDLEY and LOPES, L.JJ., concurred.

April 16. *Bigham, Q.C.*, for assenting creditors, applied for leave to appeal to the House of Lords, but

THE COURT (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) rejected the application.

Solicitors for debtors: *G. S. & H. Brandon.*

Solicitors for assenting creditors: *Ingle, Cooper, & Holmes; Foss & Ledsam; Lumley & Lumley.*

Solicitors for opposing creditors: *Letts Brothers; G. Castle.*

Solicitor for official receiver: *W. W. Aldridge.*

(1) 15 Q. B. D. 213, 217. (2) 13 Q. B. D. 118, 127.

W. L. C.

[IN THE COURT OF APPEAL.]

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Jan. 29;
Feb. 5;
March 11;
April 17.

Ex parte STANFORD. In re BARBER.

Bankruptcy—Bill of Sale—Validity—Deviation from Statutory Form—Assignment of Chattels "as beneficial owner"—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 2, 7.

A bill of sale of chattels, given by way of security for the payment of money, by which the grantor purports to assign the chattels "as beneficial owner," is not "in accordance" with the form given in the schedule to the Bills of Sale Act of 1882, and is therefore made void by s. 9 of that Act.

Per Lord Esher, M.R., and Cotton, Lindley, Bowen, and Lopes, L.JJ. A bill of sale which deviates from the statutory form will not be made void by s. 9, if it produces the precise legal effect—neither more nor less—of that form, and if the variance is not calculated reasonably to deceive those for whose benefit the statutory form is provided.

Per Fry, L.J. *Semble*, that a bill of sale which produces precisely the same legal effect as a document in the statutory form may still be void under s. 9, if, for instance, it contains prolix and useless recitals, and is generally framed with unnecessary prolixity.

A bill of sale of chattels given as security for money contained stipulations by the grantor to insure the chattels against fire in the sum of 900*l.*, to pay the premiums, and, on demand, to produce the receipts for the premiums to the grantee; and that, if default should be made by the grantor in effecting or keeping up the policy, the grantee might insure the property, and that all moneys expended by him for that purpose, with interest thereon, should on demand be repaid by the grantor, and until repayment should be a charge on the property. But it was provided that the goods should not be liable to seizure by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882:—

Held (by Lord Esher, M.R., and Lindley and Lopes, L.JJ.), that the deed was not, by reason of any of these stipulations, made void by s. 9 of the Act.

Appeal from an order made by the judge of the Colchester County Court whereby he decided that a bill of sale executed by the bankrupt on September 19, 1884, was valid.

By the bill of sale the grantor, as "beneficial owner," conveyed the chattels specified in the schedule thereto, by way of security for the payment of 936*l.* 14*s.* 2*d.* with interest. And the grantor agreed with the grantee that he would during the continuance of the security at all times keep the chattels assigned insured against

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loss or damage by fire in the sum of 900*l.* (in the joint names of himself and the grantee), and would pay all premiums necessary for effecting and keeping up the insurance, and would on demand produce to the grantee the policy or policies of such insurance and the receipt for every such payment; and that, if default should at any time be made by the grantor in effecting or keeping up such insurance, it should be lawful for the grantee to insure and keep insured the chattels in the sum of 900*l.*, and that all moneys expended by him for such purpose, together with interest thereon at the rate of 5 per cent. per annum from the time of the same having been expended, should on demand be repaid to him by the grantor, and until such repayment should be a charge upon all the premises thereby mortgaged. Provided always that the chattels thereby assigned should not be liable to seizure or be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act of 1882. The deed was duly registered as a bill of sale.

On the 20th of December, 1884, the grantor was adjudicated a bankrupt, and on July 15, 1885, the county court judge dismissed an application by the trustee in the bankruptcy for an order declaring the bill of sale void as against him.

The trustee appealed to the Divisional Court.

Dec. 8, 1885. *Cooper Willis, Q.C.*, and *Herbert Reed*, for the trustee, cited *Hetherington* v. *Groome* (1); *Melville* v. *Stringer* (2); *Sibley* v. *Higgs*. (3)

Winslow, Q.C., and *C. E. Jones*, for the grantee.

Cooper Willis, Q.C., in reply.

Dec. 9, 1885. The judgment of the Court (Hawkins and Cave, JJ.) was delivered by

CAVE, J. On the question whether the bill of sale is void because it contains a covenant making the premiums for insurance, if paid by the grantee, repayable to him by the grantor on demand, and not on a fixed day, I accept of course the decision of the Court of Appeal in *Hetherington* v. *Groome* (1), and I propose

(1) 13 Q. B. D. 789. (2) 13 Q. B. D. 392.
(3) 15 Q. B. D. 619.

to act upon and follow that decision wherever it is clearly applicable. Now in the present case the bill of sale provides that the moneys paid by the grantee for insuring the goods shall be repayable by the grantor on demand, but it does not in express terms give a power to seize the goods in default of such repayment. If it had contained that power in express terms, I am not prepared to say that the bill of sale would have been contrary to the provisions of the statute. It was argued that the grantee had that power by reason of the subsequent proviso giving him power to seize the goods on the failure of the grantor to perform the covenants in the bill of sale, and that the case was therefore brought within *Hetherington* v. *Groome* (1) and *Sibley* v. *Higgs*. (2) I do not agree with that view. I think there is a difference between payment of the principal and interest due on the security and payment of recurrent sums, such as premiums for insurance, becoming due to the grantee in certain events. In *Hetherington* v. *Groome* (1) the Court of Appeal held that the bill of sale was bad, because it provided for the payment of the principal and interest on demand, whereas the form given in the schedule provided for payment of principal and interest on a day certain. The statute gives no form of words relating to insurance, and I therefore think the principle of that case does not apply. If that principle did apply, it would be necessary to specify in the bill of sale a date for the repayment of insurance premiums by the grantor after the date on which the grantee might have paid them. That would require a difficult and cumbrous form, and the intention of the statute, which is meant to be used as a shield for an honest debtor, would not be carried out. On these grounds I am of opinion, and my Brother Hawkins concurs, that the objection to the bill of sale fails, and the appeal must be dismissed.

Appeal dismissed.

W. A.

The trustee appealed to the Court of Appeal, leave having been obtained for the purpose.

Jan. 29, 1886. *Cooper Willis, Q.C.*, and *Herbert Reed*, for the

(1) 13 Q. B. D. 789. (2) 15 Q. B. D. 619.

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appellant. The bill of sale is void under s. 9 (1) of the Bills of Sale Act of 1882. It is not in accordance with the form given in the schedule to the Act.

(1) Sect. 7. "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

(2) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

(3) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

(5) If execution shall have been levied against the goods of the grantor under any judgment at law."

Sect. 9. "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

Sect. 13. "All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

The form of bill of sale given in the schedule is as follows:—

"This Indenture made the day of , between *A. B.* of of the one part, and *C. D.* of of the other part, witnesseth that in consideration of the sum of £ now paid to *A. B.* by *C. D.*, the receipt of which the said *A. B.* hereby acknowledges [*or whatever else the consideration may be*], he the said *A. B.* doth hereby assign unto *C. D.*, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of £ per cent. per annum [*or whatever else may be the rate*]. And the said *A. B.* doth further agree and declare that he will duly pay to the said *C. D.* the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said *A. B.* doth also agree with the said *C. D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C. D.* for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882."

The covenant to produce on demand the policy of insurance and the receipts for premiums is not a reasonable provision, and if there was a breach of the covenant the grantee would be entitled to seize the goods.

Then, the provision that, in case the grantor does not insure the grantee may do so, and that the premiums which he may pay shall be repaid to him on demand, is contrary to the intention of the Act. There ought at any rate to be a provision that the demand shall be in writing: Bills of Sale Act, 1882, s. 7. A covenant which is not necessary "for maintaining the security" ought not to be inserted; it necessarily complicates the transaction: *Hetherington* v. *Groome* (1); *Melville* v. *Stringer*. (2)

Again, the effect of making the assignment of the goods "as beneficial owner" is to introduce into the deed, by implication, the mortgage covenants specified in s. 7, sub-s. 1 (c) of the Conveyancing Act, 1881. No ordinary grantor, looking at the bill of sale, would suppose that all those complicated covenants were implied; and, if the covenants were inserted in the deed verbatim, the deed would not be in accordance with the statutory form.

Winslow, *Q.C.*, and *C. E. Jones*, for the grantee, were not heard.

LORD ESHER, M.R. In my opinion there is no blemish to be found in this bill of sale.

The question is whether it is or is not valid under the Act of 1882. It is said that the stipulation that the grantor will produce the receipts for the insurance premiums on demand is unreasonable, and makes the bill of sale void under the Act. But the Act has nothing to do with the reasonableness or unreasonableness of the bargain between the parties; it only deals with that which is to be inserted in the bill of sale. It might be said that it was unreasonable if the rate of interest was 25 per cent. But it is not because the stipulations are unreasonable that you can set aside a bill of sale. In the present case, it was part of the bargain that the receipts for the premiums should be produced on demand. Is there any reason against inserting such a stipulation in the bill of sale? That the receipts should be produced on demand was one of the terms as to the insurance, and the

(1) 13 Q. B. D. 789. (2) 13 Q. B. D. 392.

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form in the schedule provides that those terms shall be inserted in the deed. The bill of sale cannot, therefore, be invalidated on this ground.

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Then it is said to be an unreasonable provision that if the grantor does not pay the premiums, the grantee may pay them and add them to the amount secured by the deed, and that the grantor will repay the amount paid by the grantee on demand. But that, again, was one of the terms as to the insurance, and its insertion cannot invalidate the deed. Then it is said that the insertion of a covenant which is not necessary for the maintenance of the security, though no effect is given to it, will invalidate the deed. I do not think that the insertion of mere surplusage, which is not necessary to the maintenance of the security, will invalidate the deed. [His Lordship then gave his reasons for thinking that there was no foundation for the objection arising from the use of the words "as beneficial owner," but, as the appeal was afterwards re-argued on this point, it is unnecessary to state those reasons. His Lordship continued:—]

Then the objections are reduced to this, that the bill of sale is not in the form given in the schedule to the Act. Of course, it is not in that exact form. I do not intend to flinch from what I have said in previous cases, that, though there may be no actual breach of the provisions of s. 9, yet if a bill of sale is so far away from the statutory form that it would not give to an ordinary borrower substantially clear information as to what he was about to do, it would not be in accordance with that form. But, if a bill of sale is a plain and simple document which would not deceive any ordinary borrower, the Court has never said that it must be set aside because it is not in the exact form given in the schedule. In the present case, I am of opinion that the bill of sale is not so intricate, by reason either of its length or the manner in which it is expressed, as to place any real difficulty in the way of the borrower. It is in substance made in accordance with the statutory form, and I think it is not invalid on any of the grounds which have been suggested. The appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. I think that the covenant for the production of the receipts for premiums is not in

any way contrary to the Act, though there might perhaps have been some difficulty about it but for the clause which prevents the seizure of the goods for any cause other than those specified in s. 7 of the Act. It is said that the bill of sale is not in accordance with the statutory form. Looking at the words which are printed in italics in the statutory form, it is clear that a bill of sale will not be void merely because it contains some stipulations which are not among those which are printed in the ordinary type. The form contemplates that there may be other stipulations besides those. The Act does not say that a bill of sale must contain neither more nor less than the form in the schedule; it only says that it shall be void unless it is made in accordance with that form. I think that in the present case there is nothing in the bill of sale which is repugnant to the form. [His Lordship then stated his opinion that the use of the words "as beneficial owner" did not invalidate the bill of sale.]

LOPES, L.J. It is said that the stipulation for the production of the receipts for premiums is an unreasonable one. But it is clearly not an agreement necessary for maintaining the security, and it is therefore not within s. 7. I think it may be regarded as mere surplusage. And, in my opinion, the insertion of any stipulations the observance of which leads to nothing, will not invalidate a bill of sale. [His Lordship then said he was inclined to think the words "as beneficial owner," did not affect the validity of the deed, but that he had some doubt on this matter.] Then it is said that the bill of sale is not in the form given in the schedule. No doubt, it does not servilely follow that form. But it is only necessary that it should follow the form in substance. This is very clearly put by Fry, L.J., in *Melville* v. *Stringer*. (1) I think this bill of sale is substantially in accordance with the form in the schedule.

After these judgments had been delivered the Court desired to have the question which arose upon the Conveyancing Act re-argued, and the appeal was placed in the paper again for this purpose.

(1) 13 Q. B. D. 392, 402.

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Feb. 5, 1886. *Cooper Willis, Q.C.*, and *Herbert Reed*, for the appellants. The chattels comprised in this bill of sale are "property" within the definition contained in (1) s. 2 (i.) of the Conveyancing Act, 1881; the deed is a "conveyance" within the definition in s. 2 (v.), and it is a "mortgage" within s. 2 (vi.). The words "beneficial owner" as used in s. 7 have a purely technical meaning; the only effect of using them is to introduce into the deed by implication certain covenants specified in s. 7; in the case of a mortgage, the covenants specified in s. 7 sub-s. 1 (C.), are implied. If, then, these covenants are introduced into the bill of sale, the grantee will be entitled at any moment after default in payment of principal and interest to enter and take and have the chattels, and to do what he pleases with them. He can remove them at once, and this would be inconsistent with the Bills of Sale Act. By force of the Conveyancing Act the provisions of s. 19 of that Act are introduced into every bill of sale subject of course to sub-s. 3 of s. 19 and to ss. 20 and 21.

A mortgagee always had these powers given to him. The object of s. 7 was to shorten deeds by introducing into them by

(1) Sect. 2. "(vi.) Mortgage includes any charge on any property for securing money or money's worth."

By s. 7 the following covenants shall be deemed to be included and implied:

"(C). In a conveyance by way of mortgage the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):—

"That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made."

implication certain provisions which were usually inserted in deeds.

[LORD ESHER, M.R. If the Conveyancing Act does not apply to a bill of sale, are not the words "beneficial owner" mere surplusage?]

The words would be embarrassing and misleading to an ordinary borrower. They would be contrary to s. 9 of the Bills of Sale Act of 1882: *Hetherington* v. *Groome*. (1) The words "beneficial owner" were never used in deeds before the Conveyancing Act, they are words of art, and they could only have been used for one purpose, viz., to introduce by implication the mortgage covenants specified in s. 7, sub-s. 1 (c) of that Act. The words must be construed according to their plain meaning, unless that construction would lead to a manifest absurdity. There may be a legal interest and an equitable interest in personal chattels as well as in realty: *Hallas* v. *Robinson*. (2) The fact that some provisions not contained in the statutory form of a bill of sale are necessarily implied in every bill of sale, by virtue of express enactments in the Conveyancing Act, is no answer to the argument that an implication arising from the voluntary use of certain words will make a bill of sale void. A proviso for redemption is implied by law in every bill of sale given as security, though that proviso is not to be found in the statutory form.

Winslow, Q.C., and *C. E. Jones*, for the grantee. If, by the use of the words, "as beneficial owner," the mortgage covenants specified in s. 7 of the Conveyancing Act are introduced by implication into the bill of sale, it would still be substantially in accordance with the statutory form. The covenants would be stipulations agreed on by the parties as necessary for maintaining the security, and they are all governed by the proviso that the goods are not to be liable to seizure for any cause other than those specified in s. 7 of the Act of 1882. There is no restriction upon the length of a bill of sale; the parties may agree to the insertion of such covenants as they think necessary for maintaining the security. By the security is meant the deed, not the goods. The Conveyancing Act must be read with the Bills of Sale Act. Some sections in the Conveyancing Act, sects. 15, 17,

(1) 13 Q. B. D. 789, 793. (2) 15 Q. B. D. 288.

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and 19–25, apply to every bill of sale made by deed. The legislature have themselves introduced all those provisions into every bill of sale, and they could not have intended that the introduction of other provisions by means of the use of the words "beneficial owner" should make the bill of sale void.

Cooper Willis, in reply.

THE COURT (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) held that the effect of the use of the words "as beneficial owner" was to render the bill of sale void under the Bills of Sale Act, 1882. But they said that, as the point was one of considerable importance, and the decision would affect a great many bills of sale, they would give leave to appeal to the House of Lords if the grantee desired it.

March 5, 1886. *Winslow, Q.C.*, and *C. E. Jones*, for the grantee, pointed out to the Court that, by s. 2 of the Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 Vict. c. 9), the decision of the Court of Appeal upon an appeal from a Divisional Court of the Queen's Bench Division, sitting as a Court of Appeal from an order of a county court in bankruptcy, is made final, and that, consequently, there was no power to allow an appeal to the House of Lords.

Cooper Willis, Q.C., and *Herbert Reed*, for the trustee in the bankruptcy.

THE COURT (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) directed the case to be reargued before the full Court of Appeal.

March 11, 1886. The case was reargued this day before Lord Esher, M.R., and Cotton, Lindley, Bowen, Fry and Lopes. L.JJ.

Cookson, Q.C. (*Cooper Willis, Q.C.*, and *Herbert Reed* with him), for the trustee.

Sir H. Davey, S.G. (*Winslow, Q.C.*, and *C. E. Jones* with him), for the grantee.

Cookson, Q.C., in reply.

The arguments were in substance the same as those on the former hearing.

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The following additional cases were referred to: *Davis* v. *Burton* (1); *Consolidated Credit Corporation* v. *Gosney* (2); *Ex parte Parsons* (3); *Roberts* v. *Roberts* (4); *In re Williams.* (5)

Cur. adv. vult.

April 17, 1886. Bowen, L.J., read the following judgment of Lord Esher, M.R., and Cotton, Lindley, Bowen and Lopes, L.JJ. The first question to be considered is the true construction to be placed upon s. 9 of the Bills of Sale Amendment Act, 1882, which enacts that a bill of sale made by way of security for the payment of money is to be void unless made in accordance with the form in the schedule. We have to determine what legal meaning ought to be attached to the words "in accordance with the form." Is undeviating conformity required, or, if divergence within limits may be permitted, what are the limits within which such divergence is permissible? It is to be observed in the first place that the section does not avoid bills of sale for not being made in the form in the schedule, but only bills of sale which are not made in accordance with the form. The distinction can scarcely be accidental. In the principal Act of 1878, with which the Act of 1882 is to be construed, we find (s. 7) a provision that affidavits may be in the form set forth in schedule A to the Act of 1878 annexed. By s. 12 of the Act of 1878, the registrar is to file certain statutory particulars as to names, &c., in the form set forth in the second schedule B or in any other prescribed form. In the previous Act of 1854, the statutory particulars were by s. 3 to be entered by the registrar according to a form given in that schedule. The precise expression adopted by s. 9 of the Act of 1882 is not therefore to be treated as immaterial. The question would seem to be: When is a bill of sale, which is not made in the form given by the 1882 schedule, made nevertheless in accordance with such form? According to one view submitted to us the amount of divergence and its materiality must be a question for the judge to consider, and depends upon the simplicity or prolixity, the brevity or the length, of the additions

(1) 10 Q. B. D. 414; 11 Q. B. D. 537.
(2) 16 Q. B. D. 24.
(3) 16 Q. B. D. 532.
(4) 13 Q. B. D. 795.
(5) 25 Ch. D. 656.

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engrafted upon the statutory form. This seems a somewhat vague criterion to apply, and one which would leave the validity of bills of sale at the mercy of the particular judge. While it is material to notice the simplicity of the prescribed form, it is nevertheless to be remembered that there is nothing about simplicity or prolixity in the Act itself, and it would not be a sound method of construction to introduce a vague definition of this kind not found in the statute itself. What, indeed, would be the measure of the simplicity by which such divergence would have to be tested? Would it be the average simplicity of borrowers throughout the kingdom, or the feeling of the particular tribunal which decided the case? To take an obvious example, the form of bill of sale set forth in the schedule contains no recital. But would a mere recital, which superadded no legal obligation upon the grantor by way of estoppel or otherwise, be such a departure from the form as must avoid the instrument, or must the validity of the instrument depend upon a judge's opinion as to whether such a recital was prolix or concise? There is no legal certainty about such a test, and it is based upon nothing in the statute. A sounder interpretation of the words "in accordance with the form" appears to be that which is more in harmony with the recognised maxim of construction, "Superflua non nocent." A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect. In estimating the effect of a divergence, one must not take into consideration for the moment the provision of s. 9, that the bill of sale if it varies from the form is to be void, for owing to this statutory penalty no material variation can in the end have any legal effect at all. To suppose, for example, that a bill of sale can be brought back into harmony with the statutory form by the mere addition of a proviso that all covenants or conditions at variance with the

statutory form are to be disregarded would be absurd. We must take the form, interpreted by the light of the Act, on the one hand, the instrument to be discussed upon the other; and we must then consider whether, but for the avoidance inflicted by s. 9 of the statute, the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form, or whether the instrument in respect of such variance would be calculated reasonably to deceive those for whose benefit the statutory form is provided. If so, the variance is material, and the bill of sale is not in substantial accordance with the statutory precedent. Whatever form the bill of sale takes, the form adopted by it in order to be valid must produce, not merely the like effect, but the same effect—that is to say, the legal effect, the whole legal effect, and nothing but the legal effect which it would produce if cast in the exact mould of the schedule. Such a test as this contains no element of uncertainty, is one which every lawyer throughout the kingdom is competent to apply, and is based upon a method of interpretation familiar to our courts. This is the construction we are prepared to put upon the section, and we proceed accordingly to inquire on which side of the line the bill of sale before us falls, if this test is to be applied.

Although the bill of sale contains several recitals, and in this respect differs from the form in the schedule to the Act, we have not been invited to invalidate it on the ground of such recitals. It would have been impossible for us in any event to have treated the presence of these recitals as fatal, for they are neither misleading, nor do they tend to add to or detract from the legal effect of the document. The words upon which the real question before us turns consist of that portion of the operative part which witnesses that the grantor "as beneficial owner" assigns to the grantee the scheduled property. The real difficulty arises in consequence of s. 7, par. (C.), of the Conveyancing Act, 1881. But for this last-mentioned Act, the result which would follow from the introduction of the words "as beneficial owner" would probably be, to create a warranty to the effect that the grantor was the beneficial owner, or, in other words, that he had a right

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to assign the beneficial interest in the property covered by the bill of sale. It is open to doubt, though it is not necessary to express any opinion upon the matter, whether such a warranty would not in any event have been implied, in the absence of rebutting circumstances, from the use in an ordinary bill of sale transaction even of the statutory form. If this doubt were well founded, the addition of the words "as beneficial owner" might, but for the Conveyancing Act of 1881, be the mere expressing of what the law without such expression would imply. But we desire to abstain from indicating any view upon this question, inasmuch as the existence of the Conveyancing Act of 1881 presents what seems to us a decisive difficulty. By s. 7, par. (C.), of this Act in all conveyances by way of mortgage (and a bill of sale falls within the definition previously given of a mortgage) there is, when a person conveys and is expressed to convey "as beneficial owner," to be deemed to be included a covenant, the nature and effect of which we shall presently consider. It is alleged by those who seek to impeach the present bill of sale that, but for the consequences inflicted by the Bills of Sale Act, 1882, upon want of accordance with the form, the Conveyancing Act of 1881 would apply to the present instrument, and would have the effect of incorporating into it the covenant in question. We are of opinion that this view is correct. We think that s. 7, par. (C.), of the Conveyancing Act, 1881, did apply to all bills of sale under the then existing law, and that it is only in virtue of the special provisions of the Bills of Sale Act, 1882, and, among others, of the enactment prescribing conformity with the scheduled form, that s. 7, par. (C.), of the Act of 1881 would fail to apply to the present instrument. What remains, therefore, to be considered is, whether the introduction into this bill of sale, by virtue of the words "as beneficial owner," of the covenant set forth in s. 7, par. (C.), of the Conveyancing Act of 1881 would, if such introduction were lawful, give to the bill of sale a legal effect different from that which it would have had if the statutory form had been followed, and if the words "as beneficial owner" had been omitted. The covenant to be found in s. 7, par. (C.), of the Conveyancing Act, 1881, embraces under the head of a single covenant several independent covenants or warranties. First

comes a covenant as to title. We leave open the question to which we have already alluded—whether this express covenant for title would add anything beyond what was already involved by implication in the use of the statutory form. The next provision in order is a covenant that, if default is made in payment of principal or interest, it shall be lawful for the grantee to enter into and upon, or receive and thenceforth quietly hold, occupy, and enjoy or take and have, the subject matter expressed to be conveyed or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made. This covenant gives, upon default of payment, an immediate power of entry, and, impliedly, a power of removing forthwith and of selling the property conveyed. We are compelled to say that the importation of such a covenant into the bill of sale would give to the bill of sale a legal effect beyond that involved in the use of the simpler scheduled form. The scheduled form must be read by the light of the Act to which it is scheduled, and in particular by the light of s. 13. The true effect of the scheduled form, read by the light of s. 13, is no doubt to pass the entire property to the grantee, but not to give him the power of immediate removal till five days' interval shall have elapsed. The introduction of the covenant from the Conveyancing Act of 1881 would deprive the grantee of the benefit of these five days. Such a variation from the statutory form may appear to be slight, but, as it would be a variation which, if it could be effectually made, would alter the legal rights of the parties from the legal rights which the form gives, we are of opinion that it is a variation sufficient to prevent our holding that the bill of sale under discussion is made in accordance with the statutory form. It must therefore be declared void, and the judgment already pronounced by this Court must stand, being drawn up as of to-day.

Fry, L.J. In the conclusion arrived at by my learned Brethren in this case I entirely concur. I agree with them in holding that

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the insertion of the words "as beneficial owner" has the effect of introducing into the statutory form covenants not to be found in it, not authorized as terms for the maintenance of the security, and at variance with the statute of 1882, and consequently that the bill of sale in question is void under the 9th section of that Act.

But I am not prepared to agree with my Brethren in the rule of construction which they have laid down in respect of that section. A bill of sale may contain everything which the statutory form contains, and may have no further or other operation in law than a bill of sale in that form would have, and may yet, in my opinion, not be in accordance with that form. A bill of sale introduced by prolix and useless recitals, then writ large and long in every member, with all the prolixity for which conveyancing was once celebrated, may have in the end precisely the same legal effect as a document in the statutory form, but it would not, in my opinion, accord with it. The Act of 1882 is a remarkable statute, imposing stringent fetters on the power of contracting in respect of loans on chattels. Thus, by s. 12, it avoids any bill of sale given in consideration of less than 30*l*. It is a statute which deals in an imperious manner, not with the substance only, but with the form of the instrument, for, amongst other things, it requires (by s. 4) that the chattels shall be described in a schedule, and, with a certain exception, provides that the document shall have effect only in respect of the chattels thus described. Again, the particular section now in question is an enactment of a remarkable, and, so far as I know of late years, novel, description, for it is aimed, not at the operation or substance of an instrument, but at its form, and, in its demand for accordance with the scheduled form, it has no words of indulgence, such as "or to the like purport or effect," and in default of such accordance it makes the instrument void, not as against third persons only, but as against the maker himself. For these and other reasons I hesitate to accept the rule of construction laid down by my Brethren, and I incline to think that the legislature has, for the purpose of imposing a stringent check on the freedom of contract in respect of loans on chattels, had recourse to an

expedient more familiar to ancient than to modern law, and has required the contract to be clothed in a particular form under pain of nullity.

The order declared the bill of sale void as from its date, but directed that the grantee should be allowed all payments (if any) made by him to the bankrupt prior to the accruer of the title of the trustee in the bankruptcy which were protected by the Bankruptcy Act.

Solicitors for trustee: *Coburn & Young.*

Solicitors for grantee: *Randall & Bucknill, agents for Jones & Son, Colchester.*

W. L. C.

[IN THE COURT OF APPEAL.]

April 2.

EX PARTE DAWES. IN RE MOON.

Bankruptcy — Deed of Composition — Construction — Inconsistency between Recitals and operative Part—Settlement—Life Estate—Forfeiture in Event of Bankruptcy or Alienation—Special Case stated by County Court sitting in Bankruptcy for Opinion of High Court—Right of Appeal from Decision of High Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 97 (*sub-s.* 3), *s.* 104, *sub-s.* 2 (*a*), (*b*)—*Bankruptcy Appeals* (*County Courts*) *Act*, 1884 (47 & 48 *Vict. c.* 9), *s.* 2.

A deed of composition executed by a debtor who had filed a bankruptcy petition recited that the debtor was possessed of or entitled to the real and personal estate specified in a schedule to the deed, and that in accordance with his desire to pay his creditors 20*s.* in the pound, and in order that the composition should be secured, he had agreed with the trustee to assign to him all the property set forth in the schedule, upon the trusts thereinafter contained. By the operative part the debtor, "for effectuating the said desire, and in pursuance of the said agreement," assigned to the trustee "all and singular the several properties, chattels, and effects set forth in the said schedule hereto, and all the estate, right, title, interest, claim, and demand," of the debtor "in, to, and upon the said chattels, properties, and effects, *and all other the estate* (*if any*)" of the debtor.

The debtor was, under the trusts of a post-nuptial settlement, entitled to a life interest in certain property. This life interest was not mentioned in the schedule:—

Held, that the general words of the assignment were controlled by the recital,

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which shewed that the deed was intended to apply only to the property specified in the schedule, and that the life interest did not pass to the trustee.

The life interest was subject to a proviso that if the debtor should assign, charge, or otherwise dispose of the income, or should become bankrupt, "or do or suffer anything whereby the income, if payable to him absolutely, would become vested in any other person," then the trust declared in his favour should cease, and during the remainder of his life the trustees might apply the income for the benefit of his wife and children :—

Held, by Cave, J., that neither the filing of the bankruptcy petition nor the execution of the composition deed worked a forfeiture of the debtor's life interest.

In re Amherst's Trusts (Law Rep. 13 Eq. 464) distinguished.

An appeal lies to the Court of Appeal from the decision of the High Court upon a special case for its opinion stated by a county court sitting in bankruptcy under sub-s. 3 of s. 97 of the Bankruptcy Act, 1883.

APPEAL upon a special case stated by the judge of the Salisbury County Court for the opinion of the High Court under s. 97 of the Bankruptcy Act, 1883.

On the 20th of January, 1885, William Moon filed a bankruptcy petition in the county court, and on the same day a receiving order was made, F. A. Dawes being the official receiver of the estate. On the 23rd of February, 1885, the first meeting of the creditors was held, and a resolution was duly passed accepting a proposal made by the debtor to pay the creditors a composition of 20*s.* in the pound, which was to be secured by a deed of assignment of property of the debtor to Dawes, as trustee for the creditors, a draft of which deed was produced at the meeting. The resolution was confirmed at the second meeting of the creditors, and was afterwards approved by the Court. The deed which was afterwards executed in pursuance of this resolution bore date March 26, 1885, and was expressed to be made between Moon of the one part, and Dawes of the other part. It contained recitals of the filing of the petition and of the resolution of the creditors, and the following recitals: "And whereas the said William Moon is possessed of or entitled to all the real and personal estate specified in the schedule hereto, subject to the mortgages and charges specified in the said schedule; and whereas, in accordance with the desire of the said William Moon to pay his creditors 20*s.* in the pound on their debts, and in order that the said composition shall be secured, the said William Moon has

agreed with the said F. A. Dawes to assign to him all the property set forth in the said schedule hereto, upon the trusts and subject to the provisoes, declarations, and agreements hereinafter contained."

The operative part of the deed was as follows:—

"Now this indenture witnesseth that, for effectuating the said desire, and in pursuance of the said agreement, and in consideration of the premises, he the said William Moon doth hereby grant and assign to the said F. A. Dawes all and singular the several properties and chattels and effects set forth in the said schedule hereto, and all the estate, right, title, interest, claim, and demand of him the said William Moon in, to, and upon the said properties, chattels, and effects, *and all other the estate (if any) of the said William Moon*, upon the trusts and for the intents and purposes, and with and subject to the powers, provisoes, agreements, and declarations hereinafter declared, expressed, and contained concerning the same."

The words in italics were inserted after the deed had been engrossed.

A question afterwards arose whether a life interest in the income of a sum of 50,000*l.*, to which the debtor was entitled under the trusts of a post-nuptial settlement, was included in the deed. The life interest was not mentioned in the schedule.

The settlement contained the following proviso:—"that if the said William Moon shall assign, charge, or otherwise dispose of the said income, or any part thereof, or shall become bankrupt, or do or suffer anything whereby the said income if payable to him absolutely, or any part thereof, would become vested in any other person, then and in such case the trust hereinbefore declared in favour of the said William Moon shall, so far as the law will permit the same, cease, and during the remainder of the life of the said William Moon the said trustees or trustee may at their or his own discretion apply the whole or any part of the said income, subject to the said annuity, for the support and benefit of the said Kathleen Amelia Bellair Moon and the issue of the marriage (if any), or any one or more of them, in such manner as the said trustees or trustee shall think fit, and shall pay and apply the surplus (if any) of the said income, or the

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whole thereof (if none shall be applied in manner aforesaid) to the persons or person to whom and in which the said income would be payable or applicable under these presents if the said William Moon were dead, and, if there shall be no such person, then unto the said William Moon himself." And it was thereby declared that from and after the death of the debtor the said trustees or trustee should (subject always to the payment of an annual sum of 500*l.* to the debtor's wife) stand and be possessed of the said sum of 50,000*l.*, and the income thereof respectively, in trust for the children of the marriage as therein provided.

On the 24th of July, 1885, an application was made by Dawes to the county court for an order to strike out or vary the above proviso in the post-nuptial settlement, and to order the payment of the income of the 50,000*l.* (subject to the payment of the 500*l.* per annum to the debtor's wife) to Dawes, for the benefit of the debtor's estate. On the application coming on to be heard, the judge of the county court, with the consent of the parties, stated a special case for the opinion of the High Court, under the provisions of sub-s. 3 of s. 97 of the Bankruptcy Act, 1883.

The questions stated by the case for the opinion of the High Court were (inter alia):

1. Whether Dawes was an incumbrancer or assignee of the life interest of the debtor under the settlement.

2. Whether the proviso for forfeiture contained in the settlement was void against Dawes.

3. And, if void, whether it was absolutely void, or void to a limited and what extent.

Feb. 22. The special case was argued before Cave, J.

Cooper Willis, Q.C., and *F. Cooper Willis*, for Dawes. The debtor by filing his petition in bankruptcy has forfeited his life interest, but the gift over does not take effect as against a subsequent incumbrancer or a trustee in bankruptcy: *Phipps* v. *Lord Ennismore* (1); *Higinbotham* v. *Holme*. (2) In this respect a trustee under a composition deed stands in the same position as a trustee in bankruptcy: *In re Amherst's Trusts*. (3) The life interest of

(1) 4 Russ. 131. (2) 19 Ves. 88.

(3) Law Rep. 13 Eq. 464.

the debtor, therefore, although not included in the schedule to the composition deed, was intended to pass and did pass to the trustee under the general words "all other the estate, if any, of the said W. Moon" in the operative part of that deed, and those words are not controlled by the recitals.

R. T. Reid, Q.C., and *Seward Brice*, for the wife and infant child of the debtor. A composition under the present Bankruptcy Act is equivalent to a liquidation by arrangement under the Bankruptcy Act of 1869: *Ex parte Eyston* (1); and by the filing of the bankruptcy petition the debtor committed a breach of the third branch of the forfeiture clause, for he has committed an act by which his life interest would or might vest in some one else. But if not, then the composition deed operated as an alienation by deed, and *Phipps* v. *Lord Ennismore* (2) and *Higinbotham* v. *Holme* (3) do not apply; but the forfeiture enures for the benefit of those claiming under the settlement: *Knight* v. *Browne* (4); *Brooke* v. *Pearson*. (5)

R. Vaughan Williams, for the debtor. There has been no forfeiture. First, because the bankruptcy petition has been superseded by the composition, and therefore the debtor has done no act by which his life interest would become vested in some other person. Secondly, because the life interest does not pass under the general words in the composition deed to Mr. Dawes. It is settled that, however general operative words may be, they will be controlled by the recitals: *Jenner* v. *Jenner* (6); *Walsh* v. *Trevanion* (7); *Dart's* Vendors and Purchasers, 4th ed., p. 479.

Butcher, for the trustees of the settlement.

Cooper Willis, Q.C., in reply.

CAVE, J. The first question which I have to decide is, whether the trustee under the composition deed is an incumbrancer or assignee of the life interest of the debtor. The debtor had filed his petition in bankruptcy and a receiving order had been made; but the creditors agreed to accept a composition, and for that purpose an indenture was entered into on the 26th of March, 1885,

(1) 7 Ch. D. 145.
(2) 4 Russ. 131.
(3) 19 Ves. 88.
(4) 30 L. J. (N.S.) (Ch.) 649.
(5) 27 Beav. 181.
(6) Law Rep. 1 Eq. 361.
(7) 15 Q. B. 733.

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between the debtor of the one part, and the trustee, Mr. Dawes, of the other part. The right which the trustee took, he took under that indenture and not otherwise.

It was open to the creditors to insist on having the whole of the property of the debtor, and it was open to the debtor to acquiesce in or refuse that demand, and one must see what they have actually agreed to do. Now, there is a recital to this effect: "And whereas the said William Moon is possessed of or entitled to all the real and personal estate specified in the schedule hereto"—that does not say, certainly, that he is not entitled to anything else; it is a recital that he is entitled to the property specified in the schedule—"And whereas, in accordance with the desire of the said William Moon to pay his creditors 20s. in the pound on their debts, and in order that the said composition shall be secured, the said William Moon has agreed with the said Frederick Aston Dawes to assign to him all the said property set forth in the said schedule hereto, upon the trusts and subject to the provisoes, declarations and agreements hereinafter contained." That recital again clearly affects the property set forth in the schedule, and no other property, and it says that the agreement which has been come to is that the property in the schedule shall be assigned. When this indenture was entered into the creditors knew, or might have known if they had thought fit to examine the file of the proceedings, that, over and above the property in the schedule, the debtor was entitled to an interest under a deed of settlement, and, consequently, they might have included that interest in the deed of assignment if it had been the intention of Mr. Moon and the creditors that it should be comprised in that deed. But there is nothing in the recitals to point to his interest under the settlement. What is there to affect that interest? There is a very peculiar clause in the operative part of the deed: "Now this indenture witnesseth that, for effectuating the said desire, and in pursuance of the said agreement, and in consideration of the premises, he the said William Moon doth hereby grant, bargain, assign, transfer, and set over unto the said Frederick Aston Dawes all and singular the several properties, chattels, and effects set forth in the said schedule hereto"—that carries out the agreement which has

been recited—"and all the estate, right, title, interest, claim, and demand of him the said William Moon in, to, and upon the said properties, chattels and effects." Then come the words "*and all other the estate, if any,* of the said William Moon.". I really do not know what those words mean, coming where they do, and expressed as they are. The previous expression, "all the estate, right, title, and interest, &c.," is a legal expression which one perfectly well understands. It means the quantity of interest which the debtor has in a particular given property; but what the words "*all other the estate, if any,* of the said William Moon" may mean I cannot say. There is nothing in the agreement as recited to warrant the conclusion that they mean the whole of his property. If that was the intention of the parties, nothing was simpler than to execute a conveyance of the whole of his property in the ordinary form for that purpose. But here you have a recital that the agreement is to extend to the property specified in the schedule, and that the creditors have agreed that that property shall be assigned to the trustee, without a word being said of anything further, although they were aware that he was entitled to an interest under the settlement; and when we come to the testatum we find an assignment of the property which is included in the schedule, and also the words "*and all other the estate, if any,* of the said William Moon." I certainly do not understand what those words mean. I think, however, that they were not intended to affect the recited agreement; and, if I were to form an opinion at all on the subject, I should say that some person ignorant of the proper mode of drawing up a deed inserted those words as general words without at all considering what the real agreement was between the parties, and not knowing what effect they would have. That is the only conclusion I can come to; and the result is, in my judgment, that the trustee is not an incumbrancer on and does not take the life interest of the debtor under the settlement.

The next question is, whether the forfeiture clause in the settlement applies to what has taken place, that is to say, whether Mr. Moon has forfeited his life interest. Now the proviso is "if the said William Moon shall assign, charge, or otherwise dispose of the said income"—he has not done either of those things—"or

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shall become bankrupt"—he has not done that—"or shall do or suffer anything whereby the income if payable to him absolutely, or any part thereof, would become vested in any other person," then the trustees of the settlement are to take the income. It is contended that he has done or suffered something "whereby the income would"—it is not "might"—"become vested" in some one else. It is difficult to understand what the meaning of that is. It seems to be very indifferent English, and I can only understand it to mean, if he does anything whereby the income "will" become vested in some other person. Then has he done anything whereby the income "has" become vested in any other person? Certainly not. It is said that he has done something whereby the income "might" become vested in some other person, because he has filed a petition in bankruptcy. That, to my mind, is a meaning which the words will not bear. It is not whereby the income "may" become vested; but "will" become vested. I cannot put any other construction on "would" than "will." It seems to me an improper mood to have used. Is there anything in the deed which ought to lead me to put a different interpretation upon the word? If I look at the other alternatives in which there is to be a forfeiture, I see in all of them that there must be an actual assignment, either by some instrument or by operation of law, that is to say, the thing which he is to do is something which actually does take the property out of him. Then I think I must read the words which follow as meaning something of the same kind. I think the words "do or suffer anything whereby the income would become vested in any other person" must mean, do or suffer something the effect of which is to vest the income in somebody else. When a man files a petition in bankruptcy his income and property do not thereby become vested in somebody else. They may become vested in somebody else, if the petition is followed by an adjudication, but of course it is possible that no adjudication will take place, and it is equally possible that the property may not become vested in anybody else. If the words were "*may* become vested," there might be something to be said for the contention; but, looking at the words as they are, I think that nothing will satisfy them except some deed or sufferance, the effect of which is actually to vest the

property in some other person. Is there any case which prevents me from putting that interpretation on the words? I was referred to *In re Amherst's Trusts* (1) which, however, seems distinguishable. There the words used were "part with the property"—a very general and loose expression indeed—and it was held that those words were sufficiently complied with, because there was the presentation of a petition, upon which it was open to the Court to appoint a receiver of all or any part of the debtor's property, and the learned Vice-Chancellor said that that was a parting with his property, because he had done something which enabled the Court to take possession of all which belonged to him. It is obvious that the words used there pointed at something very different from assigning your property, or vesting your property in some one else, and I do not understand that the Vice-Chancellor would have held that, if the words had been the same as they are here, the same result would have ensued. In truth, every deed must be construed according to the particular words to be found in it, and, when those words are of a loose and general character, almost anything may be intended to be embraced by them. But when the words used are definite, as they are here, I am not at liberty to put any other interpretation on them than that which is their natural meaning. I cannot understand that the clause means anything more than a sweeping-up, so to speak, of what has gone before. It means that the income shall not become vested in some other person. It may become vested in some other person voluntarily by alienation, or involuntarily by the act of the law —as in the case of bankruptcy—and, in order to sweep up every other possible case in which it can be vested in any other person, the words are used "if he do or suffer anything whereby the income would become vested in some other person." It appears to me that there has been no forfeiture.

H. L. F.

From this decision the trustee of the composition deed appealed.

April 2. *Rigby, Q.C., Cooper Willis, Q.C.*, and *F. Cooper Willis*, for the appellant.

Cookson, Q.C. (*R. Vaughan Williams*, and *Seward Brice*, with

(1) Law Rep. 13 Eq. 464.

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him), for the debtor and his wife. There is a preliminary objection to the appeal. The special case was stated for the opinion of the High Court under sub-s. 3 of s. 97 (1) of the Bankruptcy Act, 1883. An opinion given in that way is not "an order" of the High Court, and no appeal lies from it to this Court. The opinion is given as a direction or guide to the judge of the county court, and whatever order is made in consequence of the opinion must be made by him. Under sub-s. 2 (*a*) of s. 104 of the Bankruptcy Act, 1883 (2), an appeal lay from an order of a county court to the Court of Appeal, but by s. 2 of the Bankruptcy Appeals (County Courts) Act, 1884 (3), that right of appeal is taken away, and an appeal to a Divisional Court is substituted, and there is no appeal from the order of the Divisional Court without leave. No such leave has been, or could be, given in the present case, which has not been heard by a Divisional Court. The proper course for the trustee to take is to get the judge of the county court to make an order adopting the opinion of the High Court, and then an appeal would lie to the Divisional Court. Otherwise, in every case in which a special case is stated an appeal will be brought to this Court, and the operation of the Act of 1884 may be entirely evaded.

(1) Sect. 97 (3): "If any question of law arises in any bankruptcy proceeding in a county court which all the parties to the proceeding desire, or which one of them and the judge of the county court may desire, to have determined in the first instance in the High Court, the judge shall state the facts, in the form of a special case, for the opinion of the High Court."

(2) Sect. 104 (2) "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:

(*a*) An appeal shall lie from the order of a county court to Her Majesty's Court of Appeal:

(*b*) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal.

(3) Sect. 2 of the Bankruptcy Appeals (County Courts) Act, 1884: "Section 104, sub-s. 2 (*a*), of the Bankruptcy Act, 1883, is hereby repealed, and instead thereof it is hereby enacted that an appeal shall lie in bankruptcy matters, at the instance of any person aggrieved, from the order of a county court to a Divisional Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time being be assigned shall for the purpose of hearing any such appeal be a member. The decision of such Divisional Court upon any such appeal shall be final and conclusive, unless in any case it shall seem fit to the said Divisional Court, or to the Court of Appeal, to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."

The appellant's counsel were not heard on this point.

LORD ESHER, M.R. This is not an appeal from an order of a county court. The first effective order or judgment was made or given by the High Court, and from that order an appeal lies to this Court.

LINDLEY, L.J. The Act of 1884 does not touch the right of appeal given by sub-s. 2 (*b*) of s. 104 of the Act of 1883.

LOPES, L.J. It is perfectly clear that this is not an appeal from a county court; it is an appeal from the High Court sitting in Bankruptcy.

Rigby, Q.C., *Cooper Willis, Q.C.*, and *F. Cooper Willis*, for the appellant. The first question is whether the deed of assignment passed the debtor's life interest under the post-nuptial settlement, assuming that interest to be an absolute one not liable to forfeiture. If this question is decided against the appellant, the question whether the forfeiture clause is void as against him will not arise.

The words, "and all other the estate (if any) of the said William Moon," are sufficient to include the life interest, if they are not to be cut down by the previous recitals, which express an intention of assigning the property mentioned in the schedule. The deed is perfectly consistent without those additional words. But it is a deed executed by way of security, and the Court construes mortgage deeds more in favour of the grantee than purchase deeds: *Ex parte Young* (1); *Ex parte Glyn.* (2) Primâ facie, as the object was that the creditors should receive 20*s.* in the pound, it must have been intended that all the debtor's property should pass to the trustee. If the additional words are not read as passing the life interest, the effect will be to strike them out altogether. The previous general words are ample to fulfil the ordinary function of general words. Unless the additional words pass the life interest, no effect whatever will be given to them. They must have been intended to sweep in property of the debtor (if there were any) not included in the

(1) 4 Deac. 185. (2) 1 M. D. & D. 29.

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schedule. No doubt, in some cases, the operation of general words has been restricted by the recitals in a deed, but the Court has never gone so far as to give no meaning whatever to general words: *Hagget* v. *Giles* (1). If possible, a meaning must be given to every word in a deed. There is nothing ambiguous in the operative part of the deed; there could be no doubt but for the recitals. In *Jenner* v. *Jenner* (2) general words were restricted by recitals, but still some effect was given to them. But there the general words were plainly intended only to make perfect that which had already been done; not to do something new. In the present case, if the additional words do not effect something new, they must be rejected altogether. If a recital is inconsistent with the clear operative part of a deed, the latter must prevail: *Ingleby* v. *Swift* (3); Elphinstone on the Interpretation of Deeds, p. 130.

Cookson, Q.C., R. Vaughan Williams, and *Seward Brice*, for the debtor and his wife, were not heard.

Sidney Woolf, and *Butcher*, for the trustees of the settlement.

LORD ESHER, M.R. This is a deed of assignment or conveyance of property by way of security, and the question is how it is to be construed. It is to be construed by what appears on the face of it, and by nothing else. You may of course look at the state of circumstances which existed at the time when it was made, but in the present case that will not help us at all in the construction. The deed must be construed as it stands, and by reference to nothing else.

Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

The question is, under which of those three rules does this deed come? If it falls under either of the last two, the appeal

(1) 2 Roll. Abr. 49. (2) Law Rep. 1 Eq. 361.
(3) 10 Bing. 84.

ought to succeed; if it comes under the first, the appeal must fail.

Now, that the recitals are clear cannot be doubted; they are as clear as they well can be. They state that William Moon is possessed of or entitled to "all the said real and personal estate specified in the schedule." And then that he had agreed to assign to the trustee "all the said property set forth in the said schedule hereto." Nothing can be clearer than those recitals, and they shew what the parties had agreed should be assigned.

Then we come to the operative part. Is that clear? "Now this indenture witnesseth that for effectuating the said desire"—that is, the desire of the debtor to pay his creditors 20s. in the pound, and secure it—"and in pursuance of the said agreement, and in consideration of the premises, he, the said William Moon, doth hereby grant, bargain, assign, transfer, and set over to the said F. A. Dawes all and singular the several properties and chattels and effects set forth in the said schedule hereto." So far the operative part is clear enough; it agrees with the clear recitals, and does not go beyond them. Then it goes on, "and all the estate, right, title, interest, claim, and demand of him, the said William Moon, in, to, and upon the said properties, chattels, and effects." That is also clear; but it is plain that the word "estate" does not there mean property; it means an interest. Then it goes on "and all other the estate (if any) of the said William Moon." Is it clear that the word "estate" there ought to be read "property?" The word "estate" is not one which primâ facie would be used to describe property, especially where it has been just used in contradistinction to "property." I confess it seems to me that the word "estate" in the second part of that copulated clause, has the same meaning as the word "estate" in the first part, and that it is very ambiguous and uncertain indeed whether you ought to change the meaning of the word, and say that in one part of the copulated sentence it means one thing, and in the other part it means another, when, moreover, if it is in the latter part to be read "property," so far from the assignment being "in pursuance of the said agreement," it would not be in pursuance "of the said agreement," but in pursuance of some other agreement. Therefore, so far from the operative part of

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the deed being clear, it seems to me as ambiguous as it well can be.

Clearly, then, this case falls under the first of the three rules which I have mentioned. The recitals are perfectly clear and unambiguous; the operative part is ambiguous. Therefore, the recitals must prevail, and the life interest does not pass to the appellant. One cannot help seeing that if it did, this would be the most extraordinary roundabout way of doing as simple a thing as possible. It has been suggested that, after the deed had been prepared, these words were added at the last moment. If, however, it was desired to bring in this particular life interest, there was no occasion to alter a single word in the deed; it was only necessary to insert the life interest in the schedule.

In my opinion the decision of the learned judge was perfectly right.

LINDLEY, L.J. I am of the same opinion. Of course we are in this difficulty, that the words in question will, according to the construction we are putting upon them, mean nothing, and become mere surplusage. But the case is one in which, I think, we are forced to face that difficulty.

We are not now considering any question of rectification; if we were considering that we should have to admit evidence which is not admissible on the question of construction. I do not pretend to speculate whether the parties really intended to include this life interest, except so far as we can gather their intention from the recitals and the operative part of the deed, or from any other clause in it.

Any one accustomed to legal documents must be very much struck with the parcels in this deed; I never saw, and I do not suppose any one else ever saw, such an enumeration. The first part of the description is, "all and singular the several properties, chattels, and effects set forth in the schedule hereto." Of course the words "in the schedule" shew pretty clearly what is meant; there is no ambiguity about it. Then comes what is known as the "all the estate" clause, which is intelligible enough to persons accustomed to legal instruments. Then comes something which strikes one as very odd and incomprehensible. Apart from

the recitals we should not know what was meant—"and all other the estate (if any) of the said William Moon." It does not say in what, and, if there were no recitals to throw light upon it, I do not know that any one could make out the meaning of it. It is argued by Mr. Rigby that it must mean all the debtor's other property. No doubt, the word "estate" may mean lands, tenements, and hereditaments, or it may mean property, chattels, and effects, and, if there was anything to shew that it had that meaning here, it might be held to cover such things. But I can see nothing to shew that the word is used in the sense of "property" here. If there was nothing to explain these words, I cannot help thinking that the whole thing would be extremely ambiguous. But the ambiguity is removed at once when you look at the recitals. The recitals shew what was meant by the operative part of the deed, what was intended to be conveyed, and what was in the contemplation of the parties, and, that being so, there is no ambiguity about it. Looking at the case as a matter simply of construction, without saying what might be the result of an application to rectify the deed, I think that, on the true construction of this document, the words "and all other the estate (if any)" are surplusage.

Lopes, L.J. There are several well-established rules applicable to the construction of deeds. One is this, that, if the operative part of a deed is clear, and the recitals are not clear, the operative part must prevail. Again, if the recitals are clear, but the operative part is ambiguous, the recitals control the operative part. If, again, the operative part and the recitals are both clear, but the one is inconsistent with the other, the operative part must prevail.

Now we are not asked to rectify this deed; we are only asked to construe it, and the question is, whether Dawes, the trustee of the deed, is an assignee of the debtor's life interest under the settlement. It appears to me perfectly plain that the operative part of the deed is ambiguous. If that is so, then, according to the rules of construction to which I have alluded, it becomes necessary to look at the recitals. And the recitals are as clear as they can well be. There is only one possible meaning, viz., that

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what is intended to be assigned by the deed is the property mentioned in the schedule. That being so, I am of opinion that the operative part, which is ambiguous, is controlled by the recitals, and that the life interest did not pass under the deed. The appeal must therefore be dismissed.

Solicitors for appellant: *Dawes & Son.*
Solicitors for debtor: *Wade & Lyall.*
Solicitors for trustees of settlement: *H. G. Smallman.*

W. L. C.

March 1; *April* 16.

[IN THE COURT OF APPEAL.]

EX PARTE MERCER. IN RE WISE.

Bankruptcy—Fraudulent Conveyance—13 *Eliz. c.* 5—*Intent to delay, hinder, or defraud Creditors—Pending Action for Breach of Promise of Marriage —Voluntary Settlement for Benefit of Wife and Children—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A master mariner was married at Hong Kong on May 31, 1881. In the following August, an action for breach of promise of marriage was commenced against him, and the writ served upon him at Hong Kong on October 8. At the time of his marriage he was entitled to a legacy of 500*l.*, which had become vested in possession on the death of his mother (who had a life interest in it) on May 11, 1881. On October 17, 1881, being still at Hong Kong, he made a voluntary settlement of the legacy upon trust during the joint lives of himself and his wife for her for her separate use, remainder for the survivor for life, remainder for the children of the marriage, remainder, in default of children, for himself absolutely. Judgment was obtained against him in the action on July 20, 1882, for 500*l.*, and in November, 1884, he was adjudicated bankrupt. It appeared that when he executed the settlement he was able to pay his debts without the aid of the property comprised in the settlement, and that he did not know that he was entitled to the legacy until a few days before he executed the settlement, and he stated that in executing it he was not influenced by the action which had been commenced against him:—

Held, that there was not sufficient evidence to warrant a judge or jury in finding that the settlement was intended to "delay, hinder, or defraud creditors" within 13 Eliz. c. 5.

Freeman v. *Pope* (Law Rep. 5 Ch. 538) considered.

APPEAL from an order of the Judge of the Croydon County Court, by which it was declared that a postnuptial settlement executed by H. J. J. Wise, a bankrupt, was fraudulent and void

as against the trustee in the bankruptcy, and the trustee of the settlement was ordered to deliver it up to be cancelled.

The bankrupt was a master mariner. In the year 1881 he was engaged to be married to Miss Emily Agnes Vyse, but, being at Hong Kong in the course of a voyage, he, on the 31st of May, 1881, married another lady. On the 25th of August, 1881, Miss Vyse commenced an action for breach of promise against him in the Queen's Bench Division, and on the 8th of October, 1881, he was served with the writ at Hong Kong. He was under the will of his stepfather entitled to a legacy of 500*l.*, subject to a life interest given to his mother. His mother died on the 11th of May, 1881, and thereupon the legacy vested in the bankrupt in possession. The money was in the hands of W. P. Brown, the executor of the will. On the 17th of October, 1881, the bankrupt executed at Hong Kong, where he then was, a voluntary settlement of this legacy, whereby he assigned the legacy to Brown, on trust to invest the same, and to pay the income thereof, during the joint lives of Wise and his wife, to the wife for her separate use without power of anticipation, and, after the death of such one of Wise and his wife as should first die, to pay the income to the survivor during his or her life, and after the death of the survivor, Brown was to stand possessed of the trust fund in trust for the children of the marriage as therein mentioned, and, in default of children, in trust for Wise absolutely. On the 20th of July, 1882, Miss Vyse obtained judgment in the breach of promise action for 500*l.* damages and costs. On the 14th of November, 1884, Wise was adjudicated a bankrupt.

The bankrupt made an affidavit in the county court, in which he stated that at the time of the execution of the settlement he was perfectly solvent and able to pay his debts without the aid of the property comprised in the settlement.

After the order had been made by the county court judge, the bankrupt made a further affidavit, and an affidavit was made by Brown, and these affidavits were used on the hearing of the appeal by the Divisional Court. The bankrupt in his further affidavit said that he was not aware that he was entitled to the legacy until he received at Hong Kong between the 12th and 16th of October, 1881, a letter from Brown informing him of it.

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When he married he was not aware that he had any property to settle. Immediately he received notice of the legacy being due to him, he instructed some solicitors at Hong Kong to prepare the settlement. He said that the writ which had been served on him in the breach of promise action had no influence in inducing him to make the settlement, as he considered the writ was merely a threat, and that he should hear nothing more about the action. When he received the intimation of the legacy he told his wife that he should settle it on her, as it was the only money she would have in case of his death. She did not suggest to, or request, or influence him in any way in making the settlement, but it was made solely as a provision for his wife or any children they might have in case of his death, and, had he known before his marriage that he was entitled to the legacy, he should certainly have settled it before his marriage. He was not cross-examined on this affidavit.

Mrs. Wise and Brown appealed from the order of the county court.

Mar. 1. *H. D. Greene, Q.C.*, and *F. Cooper Willis*, for the appellants.

Morgan Howard, Q.C., and *W. H. Lynden Bell*, for the trustee in the bankruptcy.

CAVE, J. The question we have to decide is one of fact, whether this settlement was made with intent to defeat or delay creditors.

Many cases have been cited, but they are not of much assistance in deciding a question of this kind. They shew the considerations which have presented themselves to the minds of other judges under different circumstances, and, no doubt, we ought to have regard to all those considerations. But beyond that the cases do not go. There is no case which lays down that, when it is not the necessary consequence of a settlement that creditors should be defrauded, the Court is obliged to come to the conclusion that the settlor intended to defraud them where it is satisfied that he did not. Looking at the facts which are established by the affidavits, it appears to me reasonably clear

that the bankrupt had no intention whatever of defrauding his creditors, and that he had not got Miss Vyse and her claim in his mind when he made the settlement.

When the case was before the county court judge there was only a very short affidavit made by the bankrupt, which was directed to the question which arose under the Bankruptcy Act, and I am not surprised that upon the facts before him the learned judge came to the conclusion that the settlement was void. Upon those facts alone I should have come to the same conclusion. [His Lordship referred to the provisions of the settlement, and continued:—] Reading those provisions it seems impossible to come to the conclusion that the bankrupt really made the settlement for the purpose and with the intent of defeating or delaying his creditors. The terms of it seem to corroborate very strongly his statement that he did it honestly, without a thought of Miss Vyse and her claim, for the purpose of settling something upon his wife and family, and that, had he known of the legacy before his marriage, he would have made the settlement then.

It is said, however, that, although we may be of opinion that the bankrupt was acting perfectly bonâ fide, and that he had not the slightest intention of defeating or delaying his creditors, yet, if it is the necessary result of what took place that his creditors will be defeated or delayed, we are bound to hold that he had that intention, though, in fact, we do not believe that he had.

In most of the cases which have been cited the settlor was a trader, and undoubtedly when a trader makes a settlement, more especially if he does so when he is just about to commence a course of trade which may turn out to be disastrous, it is difficult to come to any other conclusion than that he contemplates the possibility of his trade being unfortunate, and wishes to put his property out of the reach of his creditors. In the present case, however, it does not seem to be at all a necessary result of the settlement that his creditors would be defeated. It is true that during the life of the wife the money could not be got hold of by his creditors. But, if she died young, there would be the income of the fund which his creditors could get hold of. If she died without children the whole property would be

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absolutely his, and would come to his creditors. Looking at all these circumstances, I cannot say that there was any such necessary defeating or delaying of the creditors as would justify, or rather compel, us to hold that this was a fraudulent settlement within the statute of Elizabeth. It must be remembered that the settlor had no creditor whatever at the time when the settlement was made. He had no debt. There was merely a liability which might or might not result in a debt. I do not think that the decisions which have been referred to have ever been held to apply where there is nothing more than a liability of this nature. The bankrupt was not a trader, and he was not likely therefore to incur debts in the future. I do not think it has ever been held that the Court must necessarily come to the conclusion that there was an intent to defeat and delay creditors in executing a settlement of property under such circumstances.

There is another point which was not dealt with by the county court judge, though it was taken before him, viz., that, if the settlement is not void under the statute of Elizabeth, it is void under s. 47 of the Bankruptcy Act. I think, however, that the parties claiming under the settlement have proved that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in it. The bankrupt himself in terms swears that he had no debts then, and this is confirmed by the statement of his debts and liabilities which he has made in the bankruptcy.

His bona fides is also shewn by his conduct after the execution of the settlement. He sailed for England immediately afterwards, and arrived there in November. He did not keep the settlement secret, to be sprung upon his creditors only in case of an unfavourable verdict against him in the action; but, on the 29th of November, without anything having taken place in consequence of the service of the writ, he told Brown of the settlement. To my mind this is a proof of his bona fides, and that his real intention was to make the settlement for the benefit of his wife and children, and not for the purpose of defeating or delaying his creditors. All the other circumstances seem to point in the same direction. The person chosen as trustee of the settlement was the executor of his stepfather's will. The trustee was allowed, if he thought

fit, to keep the property in its then existing state of investment; there was no attempt to secrete it, and there was nothing to prevent any one who was aware of the existence of the will from at once discovering where the property was and how it was invested.

For these reasons I think that the trustee in the bankruptcy ought not to succeed in his application, and, consequently, the motion must be dismissed, although had the evidence stood as it was before the county court judge I should certainly have come to the opposite conclusion.

GRANTHAM, J. I am of the same opinion. I agree with my learned Brother as to the position the case would have assumed if we had had to decide it simply on the original affidavit.

No doubt our judgment may be considered as to a certain extent qualifying the judgments of Lord Romilly, M.R., in *Barling* v. *Bishopp* (1), and of Lord Hatherley, L.C., and Giffard, L.J., in *Freeman* v. *Pope*. (2) But I think that, if those cases are carefully examined, it will be found that the facts in them were entirely different from those of the present case.

When learned judges have said that, if the necessary result of a settlement is to hinder creditors, it must be taken to have been executed with that intent, this observation must be taken as applied to the character of the particular case in which it was made.

In all the cases which have been referred to the settlor had considerable debts or liabilities, and in none of them was there the same reason for making the settlement which existed in the present case, viz., the wish to settle upon the wife of the settlor property to which he had become unexpectedly entitled after his marriage, and it cannot be said that, with the exception of the writ having been served upon him, there was any such inducement for him to make the settlement as there was in all the other cases which have been cited. In *Barling* v. *Bishopp* (3) it is quite clear that there was a very strong motive operating upon the mind of the settlor, and no one could doubt that he had a fraudulent intention of defeating the plaintiffs in two actions which had been

(1) 29 Beav. 417. (2) Law Rep. 5 Ch. 538.
(3) 29 Beav. 417.

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commenced against him. After the execution of the settlement the indiciæ of title to the settled property remained with him. He never gave up the title deeds, and he remained in possession of the property just as he had been before. There can be no doubt in my mind that in that case the deed was fraudulent.

Again in *Freeman* v. *Pope* (1), on the facts which appeared, I can quite understand the decision of the Lord Chancellor and Giffard, L.J. In all the cases which have been cited the facts themselves suggested an intention (if not an actual fraudulent intention) to hinder creditors. In the present case I am of opinion that, as judges of fact as well as of law, we are bound to find that the mere making of the settlement, at the time and under the circumstances in which it was made, does not justify us in coming to the conclusion that there was any intention to delay, hinder, or defraud creditors within the meaning of the statute.

With regard to s. 47 of the Bankruptcy Act, I do not think that the present case comes within it, and for this very simple reason, that, at the time when the bankrupt made the settlement he was, on the evidence before us, able to pay his debts without the aid of the settled property. The only case which has been quoted as justifying us in coming to a contrary conclusion is *Crossley* v. *Ellworthy* (2), in which, no doubt, it was held that damages recovered in an action against the settlor after the settlement had been made, must be taken into account in determining whether the settlor was solvent at the date of the settlement. But in that case Elworthy, the settlor, had been involved to a very large extent in Stock Exchange speculations and other financial transactions. He had been connected with a company, and it was in consequence of false representations made by him with regard to that company prior to the settlement, that judgment had been recovered against him for 36,000*l*. Under those circumstances the Court could come to no other conclusion than that he was by the settlement intentionally abstracting from his creditors, or those who were likely to become his creditors, the sum comprised in the settlement, which might otherwise have been made available by them. In my opinion *Crossley* v. *Ellworthy* (2), is not an authority for saying that the mere fact of a

(1) Law Rep. 5 Ch. 538. (2) Law Rep. 12 Eq. 158.

writ having been issued by Miss Vyse compels us, in determining whether he was solvent at the time when the settlement was made, to come to the conclusion that a liability under that writ must be assumed to have existed to the extent of making him then insolvent.

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I am of opinion that our judgment must be for the appellant.

The trustee in the bankruptcy appealed.

April 16. *W. H. Lynden Bell* (*Morgan Howard, Q.C.*, with him), for the appellant. The settlement is void as against the trustee in the bankruptcy, both under the statute of 13 Eliz. c. 5, and under s. 47 of the Bankruptcy Act, 1883. The statute of Elizabeth makes void as against creditors a deed made "to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, &c." The proper inference from the facts is that the settlement was made with the intent of defeating the claim of Miss Vyse. The necessary result of it was to defeat her claim, and it has been laid down in many cases on this statute that a man must be held to have intended the natural and necessary consequence of what he does. The law is clearly so laid down by Lord Hatherley, L.C., and Giffard, L.J., in *Freeman* v. *Pope*. (1) It is not necessary to shew an actual fraudulent intent on the part of the settlor. In *In re Ridler* (2) and in *Three Towns Banking Company* v. *Maddever* (3) the same view was taken.

Secondly, as to s. 47 of the Bankruptcy Act, 1883 (4), it is

(1) Law Rep. 5 Ch. 538.

(2) 22 Ch. D. 74.

(3) 27 Ch. D. 523, 526.

(4) Sect. 47 (1): "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

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not proved by the persons entitled under the settlement that the bankrupt was solvent independently of the settled property at the time when he executed it. In determining whether he was or was not solvent his contingent liability in the action for breach of promise, which afterwards ripened into a debt, ought to be taken into account: *Barling* v. *Bishopp* (1); *Crossley* v. *Elworthy*. (2)

H. D. Greene, Q.C., and *F. Cooper Willis*, for Mrs. Wise and the trustee of the settlement, were not heard.

LORD ESHER, M.R. I think the decision of the Divisional Court was right.

The argument was first put in this way—it is necessary to prove that the bankrupt, at the date of the voluntary settlement, intended to defeat and delay a creditor or his creditors generally; the necessary consequence of what he did was to defeat and delay his creditors; and, therefore, as a proposition of law, the tribunal which had to consider whether he did intend to defeat and delay his creditors was bound to find that he did. In support of that proposition dicta of great and eminent judges were cited. I will venture to say as strongly as I can that to my mind that proposition is monstrous. It is said that it is a necessary inference that a man intends the natural and necessary result of his acts. If you want to find out the intention in a man's mind, of course you cannot look into his mind, but, if circumstances are proved from which you believe that he had a particular intention, you infer as a matter of fact that he had that intention. No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words "necessary result" metaphysically, but in their ordinary business sense, and of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But, if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that, because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be

(1) 29 Beav. 417. (2) Law Rep. 12 Eq. 158.

a fact which one really believes to be untrue in fact. Whether the fact that the necessary effect of a voluntary deed is to defeat or delay the creditors of the grantor will make the deed void under the statute of Elizabeth, although there was no such intent in his mind at the time when he executed it, is a question which we are not now called upon to decide. But that is a question wholly independent of the question of intention. That may be the law; the Courts may have put that construction on the statute. But that is a different proposition from that which was put forward in argument, and I will not undertake to decide it now. It must be recollected that the statute of Elizabeth applies, and may make a deed void, even though the grantor never becomes a bankrupt. But this case was at first argued, not upon that footing, but upon the assumption that, if the natural or necessary effect of what the settlor did was to defeat or delay his creditors, the Court must find that he actually had that intent. That proposition or doctrine I entirely abjure.

We must look at all the facts of this case. The bankrupt was a captain of a merchant ship, and there is no evidence whether his employment ceased at the end of every voyage, or whether it was a constant employment. He had promised to marry Miss Vyse. Then he went to Hong Kong, and there he married another lady, and so laid himself open to an action for breach of promise of marriage by Miss Vyse. That action having been brought, might, so far as any one could foretell, have resulted in a verdict either for 1*s.* or for 500*l.* damages; no one could tell what the result would be. Well, he married the lady in Hong Kong in May, and in October there came out to him, by the same post from England, the information that he had become entitled to a legacy of 500*l.*, and also the information that Miss Vyse had brought an action against him for breach of promise of marriage. This was the first time that he had had any intimation of the fact that he had any realized fortune, and he immediately settled the 500*l.* upon his wife and children.

Now, what was his position at that time? According to his evidence, which is not disputed, (for he has not been cross-examined on his affidavit), he did not owe a shilling in the world. There is no evidence that he had not money owing to

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him for wages, and in all probability he had, because, if his voyage did not terminate at Hong Kong (and there is no evidence that it did), if he had got to take his ship home to England, in all probability his wages were not payable until the end of the voyage. If so, he would have means to that extent, and he did not owe a shilling.

Now with regard to the action, how could any one—how could his legal adviser—have told him what the amount of the verdict was likely to be? If the verdict had been for 50*l.*, and he had had 50*l.* coming to him at the end of his voyage, he would have been able to pay it, and on another occasion he would have been able to pay the costs. It was entirely a matter of speculation what the amount of the verdict would be. Therefore he was not insolvent; it was not the necessary consequence of what he did to defeat or delay the plaintiff in the action, for, if the verdict had been for a small amount, she would not necessarily have been delayed for a week.

In order to make this deed void under the Statute of Elizabeth (however far that statute may be stretched), we are bound in the present case to find that there was an actual intent in the bankrupt's mind to defeat or delay his creditors, and there is no evidence of such an intent. He has sworn that he was not thinking of his creditors. The only creditor, that it is suggested he had to think about, was Miss Vyse, and no one could tell what the verdict in her action would be. But what happened afterwards? It is obvious that, when the action came on for trial, evidence must have been given about this 500*l.* legacy to which the defendant was entitled, and the jury took the vindictive view of the plaintiff, and gave her as damages the whole of the defendant's realized property. It was a startling verdict, which I certainly should not have anticipated, and I do not see why he was bound to anticipate it. When you have got those facts, and you are asked to conclude that the bankrupt actually intended to defeat Miss Vyse's claim, it seems to me that the Divisional Court were perfectly justified in declining to find that he had any such intent. Upon the facts, I cannot find that there was such an intent.

The appeal must be dismissed.

Lindley, L.J. The evidence before the county court judge differed materially from that which was before the Divisional Court, and I am not surprised at the view which he took of the case. Unexplained, the circumstances had a very suspicious appearance. But the affidavits which have been filed since the hearing in the county court give a totally different complexion to the transaction, and it was upon those affidavits that the Divisional Court took the view contrary to that which had been taken by the county court judge. Now we have all the facts before us, and we must apply the law to those facts. There is a voluntary settlement made by a man who had not a farthing of debts, but against whom an action had been commenced for breach of promise of marriage. At the time when he made the settlement a sum of 500*l.* had just accrued to him, and he settled it upon his wife and children. He tells us, and the Divisional Court believed him, and I also believe that he was speaking the truth, that he thought the action for breach of promise would come to nothing. At all events, the result of it was in the highest degree speculative; he was not then indebted to the plaintiff but she had made a claim against him which might or might not result in damages. We have, therefore, to deal with the case of an honest man, not in fact indebted at all, and the question is, whether we are driven (not by the statute of Elizabeth, but by a series of decisions upon it) to say that the settlement cannot stand. I do not think we are. It is true that voluntary settlements have been set aside under the statute, as it has been construed for a great number of years, in cases in which there was no actual intention to defraud. It has been held to be sufficient if, when the settlement is executed, the circumstances are such that it must have that effect. But the language which has been used in a great many cases, that a man must in point of law be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact, and by consequences which can be foreseen with those which cannot. But although I am not prepared to say that a voluntary settlement can never be set aside under the statute of Elizabeth, as it has been construed, unless there has been in fact an intention to defraud, I am not aware of any deci-

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sion which goes the length of upsetting the present deed under the circumstances with which we have to deal. In this case there was no intention to defeat the plaintiff, and, when the settlement was executed, the probability of the plaintiff obtaining substantial damages was very slight. The case is certainly not within the language of the statute. I have no doubt that the view taken by the Divisional Court was right.

I should add that I have looked at s. 47 of the Bankruptcy Act, 1883, and it is quite clear that it does not apply.

LOPES, L.J. We need only consider the law so far as it applies to the facts of the present case. It has been argued that, if the necessary effect of a voluntary settlement is to defeat or hinder creditors, the Court is bound to infer such an intent, whether it did or did not in fact exist. I will express no opinion upon that matter, because it is not necessary for the purpose of deciding the present case. It cannot, according to my view, be said that it was the necessary consequence of this voluntary settlement to defeat or hinder the settlor's creditors. The only suggested creditor is Miss Vyse. There are many reasons why it was not a necessary consequence of the settlement that her claim should be defeated. The action might have failed for various reasons; the plaintiff might not have been willing to pursue it; it might have resulted in a verdict for the defendant, or in a verdict for the plaintiff with very small damages. There are many other ways in which the action might have terminated, without its resulting in a verdict for 500*l*. It seems to me, therefore, that it cannot be said that the necessary effect of the settlement was to defeat or hinder Miss Vyse.

What, then, is the question in this case? The question which I should have left to the jury is this—Whether, having regard to all the circumstances, the settlor intended to defeat or hinder his creditors? That is a question of fact which can only be determined by the evidence. Before the county court judge there was only one affidavit, and he came to a conclusion at which I am not at all surprised. Before the Divisional Court there were several other affidavits, and they arrived at a different conclusion, with which I entirely agree. I adopt the words of Cave, J., when he

says, "Looking at the facts which are established by the affidavits, it appears to me reasonably clear that the settlor had no intention whatever of defrauding his creditors, and that he had not got Miss Vyse and her claim in his mind when he made the settlement." I entirely agree with that conclusion, and I think the decision of the Divisional Court was right.

Solicitor for appellant: *J. Percy Godfrey.*

Solicitors for respondents: *Clarkson, Greenwell, & Wyles.*

W. L. C.

[IN THE COURT OF APPEAL.]

May 7, 8.

EX PARTE BLANCHETT. IN RE KEELING.

Bankruptcy—Bankruptcy Notice—"Creditor who has obtained a final judgment"—Assignee of Judgment Debt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

In the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*)—which enables a creditor who has obtained a final judgment against a debtor to issue a bankruptcy notice requiring him to pay or secure the debt—the words "creditor who has obtained a final judgment" do not include an assignee of the judgment debt.

Ex parte Woodall (13 Q. B. D. 479) explained.

APPEAL from an order made by Mr. Registrar Hazlitt upon an application to set aside a bankruptcy notice.

J. S. Lickorish having obtained two judgments, each for 250*l.*, against the debtor, assigned the judgments for value to W. Sarl, and he assigned them for value to Thomas Blanchett. Notice in writing of the assignments was given to the debtor, and Blanchett obtained leave under rule 23 of Order XLII. of the Rules of the Supreme Court, 1883, to issue execution on the judgments.

On the 17th of July, 1885, Blanchett issued a bankruptcy notice against the debtor in respect of the two judgment debts, On the 4th of August, 1885, the debtor applied to the Court to set aside the bankruptcy notice, asking that it might be declared that no act of bankruptcy had been committed by him. The Registrar ordered that the time for complying with the bankruptcy notice should be extended until after the determination

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of an action, to be brought within a reasonable time by Blanchett against the debtor, for recovery of the demand mentioned in the notice, and that in the meantime further proceedings on the notice should be stayed.

Blanchett appealed.

Cooper Willis, Q.C., and *Ringwood*, for the appellant. There was no ground for extending the time for complying with the notice or for staying the proceedings; the debtor's application ought to have been dismissed.

[BOWEN, L.J. Does sub-s. 1 (*g*) of s. 4 (1) of the Bankruptcy Act, 1883, apply at all to the assignee of a judgment? Can he be said to have "obtained a final judgment"?]

In *Ex parte Woodall* (2), it was held that the executrix of a judgment creditor could issue a bankruptcy notice against the judgment debtor, if she had obtained leave to issue execution on the judgment. The present appellant has obtained that leave. In *Ex parte Woodall*, Lindley, L.J., said (3), "for all practical purposes a person who has obtained leave to issue execution on the judgment is within the provision" of the section. Under sub-s. 6 of s. 25 of the Judicature Act of 1873 an assignee of a debt, who has given notice in writing of the assignment to the debtor, is entitled to all legal and other remedies for the debt which the assignor would have had.

(1) Sect. 4 provides (sub-s. 1). A debtor commits an act of bankruptcy in each of the following cases (inter alia):—

"(*g*.) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice, in case the service is effected in England, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

(2) 13 Q. B. D. 479.

(3) Page 483.

[BOWEN, L.J. Form No. 6 in the Appendix to the Bankruptcy Rules, 1883, assumes that a bankruptcy notice will be given by the original judgment creditor.]

But r. 118 provides that a bankruptcy notice shall be in Form No. 6 "with such variations as circumstances may require." There is no real distinction between this case and *Ex parte Woodall*. (1)

Winslow, Q.C., and *Herbert Reed*, for the debtor. The appellant is not within the words of sub-s. 1 (*g*). The decision in *Ex parte Woodall* (1) does not go beyond the case of the legal personal representative of the creditor who obtained the judgment. The Court regarded such a representative as in effect the same person as the judgment creditor. Cotton, L.J., said (2), "There are two things which the creditor has to do; he must obtain a judgment, and he is to serve a bankruptcy notice. The same person is to do both things." The old rule in bankruptcy still exists, that, if a debt has been assigned, the assignor must join with the assignee in any proceedings in bankruptcy against the debtor: *Ex parte Dearle*. (3)

Again, how could a counter-claim of the debtor against Lickorish be tried on this bankruptcy notice? A counter-claim against Blanchett could not possibly have been set up in the action in which the judgment was obtained.

Cooper Willis, Q.C., in reply. The counter-claim referred to by sub-s. 1 (*g*) need not necessarily be one against the original judgment creditor. It may be a counter-claim against the person who issues the notice, or either against him or the original judgment creditor.

Cur. adv. vult.

May 8. LORD ESHER, M.R. (after stating the facts). The question is, whether the appellant is a person who is entitled, under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, to issue a bankruptcy notice—whether he can, within the meaning of the sub-section, be said to be "a creditor who has obtained a final judgment" against the debtor. That he is so in the ordinary literal sense of the words it is impossible to say. It is suggested

(1) 13 Q. B. D. 479. (2) 13 Q. B. D. 482.
(3) 14 Q. B. D. 184.

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that the words must be enlarged, and enlarged so as to embrace a person in his position, and as an authority for that proposition *Ex parte Woodall* (1) is cited. In that case the other division of the Court of Appeal did so far enlarge the words of the sub-section as to make them apply to the *executrix* of a creditor who had obtained a final judgment. It is argued that, if the words are extended at all, or at any rate if they are extended so far as to include the personal representative of a deceased creditor, they ought to be extended still further, and it is said that *Ex parte Woodall* (1) is an authority for so extending them, and some expressions in the judgment of Lindley, L.J., are especially relied on. When, however, the words of a judgment in one case are relied upon as an authority governing another case, you should endeavour to find out, not only the particular facts to which those words were applied, but the principle of the judgment. And it seems to me that all the judges founded their judgments in that case upon a principle which applies only to such a representative of a judgment creditor as a legal personal representative, and, if that be so, *Ex parte Woodall* (1) goes no further. Since we heard the argument yesterday, I have taken the opportunity of asking the judges who decided *Ex parte Woodall* (1) what was their view of the principle of their decision, and, as I expected, they were all of opinion that the ground of their decision was that, inasmuch as the personal representative of a deceased judgment creditor might formerly have been made a party to the record in an action brought by the creditor, such a representative might fairly be said to be within the words of sub-s. 1 (*g*). But they all said that they meant to go no further, and they all agreed that it would be extremely dangerous to carry the words of the sub-section any further. I think, therefore, I may say that we have the authority of the whole Court of Appeal for holding that the sub-section does not go any further, and that the appellant is not, within the meaning of it, "a creditor who has obtained a final judgment." The registrar had no authority to make the order which he did make, but he ought to have set aside the bankruptcy notice altogether. The appeal more than fails, and the appellant must pay the costs of it.

(1) 13 Q. B. D. 479.

Bowen, L.J. I am of the same opinion. The question is, whether the appellant comes within the description in sub-s. 1 (*g*) as being "a creditor who has obtained a final judgment." He has not himself obtained a final judgment, but he alleges that he is the assignee of a final judgment obtained by another person, and that as such assignee he is entitled to every remedy against the judgment debtor to which the original judgment creditor was entitled, and that he ought, by a liberal interpretation of sub-s. 1 (*g*), to be considered as coming within its terms. When it is suggested that a liberal interpretation should be given to the words of a statute, the Court ought to consider what is the class of statute in which the words are found. A liberal interpretation ought not rightly to be given to any clause of a statute which entails penal consequences on any person. You ought not lightly to give a liberal interpretation to a section which defines a crime or an act of bankruptcy. The history of the Bankruptcy statutes is not immaterial. Under the Act of 1869 any debtor on whom a debtor's summons was served was liable to be compelled to pay or else commit an act of bankruptcy. What was the consequence of enabling creditors to put in force this summary process? There was a crop of abuses. The process was commonly used for the purpose of extortion, and, just as companies are often wrecked by unfounded winding-up petitions, so many debtors were assailed by an abuse of this process of the law. In the present Bankruptcy Act, among many trenchant changes, there is a notable change in the definition of acts of bankruptcy. The right to compel a debtor to pay at the risk of committing an act of bankruptcy, by serving on him a bankruptcy notice, is one given only to a creditor who has prosecuted his claim to judgment, and if execution on the judgment has not been stayed —to a creditor between whom and the full fruition of his claim there stands only a process of the law uncompleted. It is only this kind of creditor who is now entitled to issue a bankruptcy notice. This affords an excellent reason for not extending the construction of sub-s. 1 (*g*), beyond the plain letter of the words. We ought to hold that only those creditors, or the legal personal representatives of those creditors, who have prosecuted their rights to judgment, and against whom the Court has not stayed

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execution on the judgment, are entitled to enforce their claims by means of a bankruptcy notice.

FRY, L.J. I am entirely of the same opinion. It seems to me clear that sub-s. 1 (*g*) implies that the creditor who has obtained the final judgment shall also be the person to serve the bankruptcy notice. The two acts must be done by one and the same person. There are many reasons why this should be so. Many questions might otherwise arise which cannot arise when the same person does both acts. I think this was the deliberate intention of the legislature, and that it is not a merely accidental result of the words which they have used. I think also that this was the view taken by the Court of Appeal in *Ex parte Woodall*. (1) Cotton, L.J., in his judgment in that case dwelt upon the fact that the same person was to do both the things mentioned in sub-s. 1 (*g*). In the present case the judgment was obtained by one person, the bankruptcy notice was issued by another person who has a derivative title to the judgment debt. In *Ex parte Woodall* (1) the Court of Appeal came to the conclusion that the legal personal representative of a judgment creditor, who took all his personal estate and was subject to the obligation of discharging out of it all his liabilities, was for the purposes of sub-s. 1 (*g*) the same person as the creditor who had obtained the judgment. That I think was the view with reference to which Lindley, L.J., used the words which have been referred to. That view does not apply to the present case. I think, therefore, that the appellant has not brought himself within either the words or the meaning of sub-s. 1 (*g*).

But, even if the first part of the sub-section is not sufficient to exclude him, there are the subsequent words: "satisfy the Court that he has a counter-claim, set-off, or cross demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." Would the counter-claim be against the person who obtained the judgment, or against the person who served the notice, or against both?

It appears to me far from clear what the true construction of

(1) 13 Q. B. D. 479.

those words would be, if one person could obtain a judgment for a debt, and another person could issue a bankruptcy notice against the debtor in respect of it. But I think those words are clearly addressed to the view that the same person must do both the acts—obtain the judgment and issue the notice. For these reasons I agree that the appellant is not within sub-s. 1 (*g*), and that the bankruptcy notice ought to have been set aside.

Solicitor for appellant: *C. E. R. Preston.*

Solicitors for respondent: *Munns & Longden.*

W. L. C.

Appl: Sentenza Rep. Roma 4 Nov 1926. N. N. 2...

LEE *v.* ABDY AND OTHERS. *June* 7.

Conflict of Laws—Chose in Action, Assignment of, abroad—Policy of Life Insurance—Husband and Wife—Domicil.

The plaintiff sued the trustees of an English life insurance company as assignee of a policy of life insurance granted by such company. The assignment of the policy was made in Cape Colony, and at the time of such assignment the assured, the assignor, was, and he remained till his death, domiciled in Cape Colony, and the plaintiff was his wife. By the law of that colony such an assignment was void by reason of the alleged assignee being the wife of the assignor:—

Held, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment.

ACTION against the trustees of the Reliance Mutual Life Insurance Society on a policy of insurance upon the life of Ellis Laurence Lee, deceased, by an assignee of the policy.

The defence (inter alia) stated as follows: At the date of the alleged assignment of the policy the said Ellis Laurence Lee was, and he remained till his death, a merchant domiciled in Cape Colony, and the plaintiff was his wife. The title to the policy money is governed by the law of the said colony, according to which the alleged assignment, if executed, was and is void both by reason of the alleged assignee being the wife of the said Ellis Laurence Lee, and by reason that the said Ellis Laurence Lee was, and remained till his death, insolvent, and that his creditors are entitled to the policy moneys.

The plaintiff in her reply objected that the above statements

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of the defence shewed no defence in law. It was ordered by Wills, J., that the question of law whether, assuming the facts stated in the defence to be true, the rights of the plaintiff under the assignment of the policy were governed by the law of Cape Colony or by that of England should be disposed of before the trial, and that the policy should be produced on the argument. It appeared in the course of the argument to be an admitted fact that the assignment was executed in Cape Colony, though it was not expressly so stated on the pleadings.

It appeared from the policy that it was effected by the deceased Ellis Laurence Lee, who was described therein as resident at Kimberley, in South Africa, with the society, which was a life insurance company in London. It recited that the proposal for assurance and the usual declaration by the assured had been delivered at the office of the society by him, and that the truth of the statements therein were to form the basis of the contract. The policy money, together with such further sum, if any, as might be apportioned by way of bonus to the policy, was to be paid within three calendar months after proof satisfactory to the directors had been given of the death of the assured having happened within the term of the insurance. The policy contained the usual clause to the effect that the funds of the society should alone be answerable for any demand under the policy.

C. E. E. Jenkins, for the plaintiff. The assignment of the policy must be governed by English law, not that of Cape Colony. No doubt the devolution of personalty by act of the law must be governed by the law of the place of domicil: *Sills* v. *Worswick* (1); but it is contended that the same rule does not apply to assignment by act of the person: *Cammell* v. *Sewell*. (2) The question how an assignment may be made, and who will be "assigns" of a contract must, in such a case as this, be determined by reference to the original contract, and by the law of the place where such contract is made and is to take effect. This is an English policy of insurance; it is contended that it must be taken on the statements in the pleadings and the policy itself, that it was made in England, and that it is to be performed in

(1) 1 H. Bl. 665, at p. 690. (2) 5 H. & N. 728.

England. *Ladd* v. *Tucker* (1) and *In re Marseilles Extension Railway and Land Co., Smallpage's and Brandon's Cases* (2) are authorities to shew that in such a case the assignment must be governed by English law. It is true that those were cases of negotiable instruments, but a policy of life insurance being now assignable by statute, the analogy is very close between the case of such a policy and that of a negotiable instrument.

[WILLS, J. Is it clear that the locus solutionis under this policy is in this country? The general principle is that the debtor is bound to find out and pay the creditor, not that the creditor must come to the debtor to be paid.]

The policy does not say in terms that the payment is to be made at the society's office in England, but it is submitted that that is the reasonable implication from the terms of the policy in the case of life insurance. The notice of the death must necessarily be given in England.

It is submitted that the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), which made life policies assignable, by the term "assignment" must be taken to mean assignment by the law of England.

This policy gives a right to participation in profits by way of bonus, and is therefore like a share in a company, and the title to it must be governed by the domicil of the company as being the place where the property must be considered as situate: *Robinson* v. *Bland*. (3)

[DAY, J. The right to recover on the policy is merely a chose in action. It cannot be said to have any locality.]

This is not really like an ordinary debt, because the only right is against the funds of the society, which are in England. It would be highly inconvenient that the insurance company should have to ascertain whether an alleged assignment was good by foreign law.

[He cited Porter's Law of Insurance, p. 402.]

R. F. MacMillan, for the defendants. The cases that have been decided with regard to bills of exchange really have no application. They depend on the peculiar quality of negotia-

(1) Law Rep. 3 Q. B. 77. (2) 30 Ch. D. 598.
(3) 2 Burr 1077, at p. 1079.

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bility given by the law merchant to a bill of exchange. A policy of insurance, as being merely a transferable contract, does not stand on the same footing in this respect as a negotiable instrument. In *Bradlaugh* v. *De Rin* (1) it was held that a bill of exchange drawn in France and accepted and payable in England must be indorsed according to the French law. It is submitted that that case more nearly resembles the present than *Lebel* v. *Tucker*. (2)

The assignment is a contract in itself, and must be governed by the law of Cape Colony—the place where it was made and where the parties to it were domiciled. If by the law of the Cape Colony the wife could not take an assignment from the husband, there was no valid contract by which the title to the policy moneys could be passed, and consequently no assignment. This is a question of the capacity of the alleged assignee, and must be governed by the law of the domicil of the parties to the assignment; it is not a question of the mode of assignment or the incidents of the contract of assignment when made. The question depends on the status of the wife, which must be regulated by the law of Cape Colony where the parties were domiciled, not by the English law of husband and wife. Whether the place of contract is looked at or the domicil of the parties to it this assignment is bad.

Jenkins, in reply, cited *Watts* v. *Shrimpton*. (3)

DAY, J. If it were necessary to determine where the assured was domiciled when the policy was entered into, or where the policy must be considered as having been made, or where it is payable, there might be some difficulty in doing so upon the facts so far as they at present appear before us; but in the view I take it is unnecessary to go into those questions. It seems to me that quite independently of those considerations the assignment of the policy was invalid. The subject-matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is

(1) Law Rep. 3 C. P. 538 (2) Law Rep. 3 Q. B. 77. (3) 21 Beav. 97.

entered into. The assignment here in question is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment. Now the contract in fact entered into by the parties to the assignment was entered into in Cape Colony, and the parties were domiciled there, and, as I have said, it had relation to a chose in action which has no locality. It is argued that the validity of this contract must be determined by the law of England. Why should that be so? The reason given is that the parties are contracting with reference to a contract which is affected by the law of England. That consideration seems to me to be immaterial. They are domiciled and are contracting in Cape Colony, and by the law of that colony, as it seems to me, the validity or invalidity of such contract must be determined. It was urged upon us that this conclusion would occasion great inconvenience to insurance companies. But I cannot see that much greater difficulty would arise in ascertaining whether an assignment was good according to foreign law than in the ordinary case of an assignment under English law. No doubt people are theoretically bound to know the law of their country, but in point of fact in many cases they do not, and there might often be difficulties in ascertaining whether an alleged assignment according to English law had been validly effected. I do not think that any additional difficulty occasioned by the assignment being governed by foreign law is of so much moment as was suggested. We were pressed with the authority of the case of *Lebel* v. *Tucker* (1), but the decision there had relation to a bill of exchange, and I do not think that case is analogous to the present. It seems to me that the question which really arises here is one of the validity of a contract which is purely foreign, though such contract has relation to a chose in action which possibly arises upon an English contract. For these reasons I think our judgment must be for the defendants.

WILLS, J. I also think that the defendants are entitled to our judgment, though I confess that the question appears to me to

(1) Law Rep. 3 Q. B. 77.

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be one of some difficulty. Two cases were cited to us which seem to have considerable bearing on this subject, viz. *Lebel* v. *Tucker* (1) and *Bradlaugh* v. *De Rin*. (2) In the former of those cases a bill of exchange was drawn and accepted, and was payable in England, and so far the contract arising out of the bill was wholly an English contract; but the acceptance was sent over to France, and in France was indorsed by one domiciled Frenchman to another. It was held that the law which applied to such indorsement was not the French law but the English. In *Bradlaugh* v. *De Rin* (2) a bill was drawn in France and accepted by the drawee in London, but indorsed in France; and it was held that the indorsement must be regulated by the French law. It seems to me that the principle which may be deduced from those decisions with regard to the law which governs the indorsement of negotiable instruments is this. The contract and its surrounding circumstances must be looked at in order to ascertain where and with reference to the law of what place the parties contemplated the indorsement would be made. If the natural inference is that they must have contemplated it as being to take place in England, then the English law would apply to it; but if the natural inference is that they must have contemplated it as being to take place in some other country, then the law of that other country would apply to it. That principle would hardly apply to the case before us; it is not like the case of a bill of exchange, for primâ facie there is no reason to presume in such a case as this that any assignment will take place, still less is there any reason to presume that, if it takes place, it will be in England. On the contrary, the insurance being made by a person described in the policy as residing in South Africa, the probability is rather in favour of an assignment, if any, being made abroad. Under those circumstances I should, apart from authority, be disposed to think that the reasonable view would be that the person who contracts, knowing that an assignment of such contract may be made elsewhere than in England, must be taken to contract subject to the incident that such an assignment may be made anywhere, and that it will be governed by the law of the place where it is made. If that is the correct view, the company in

(1) Law Rep. 3 Q. B. 77. (2) Law Rep. 3 C. P. 538.

entering into the assurance take on themselves the risk of having to ascertain what may be the law of any place where an assignment may be made. It follows that, as the assignment in the present case is void according to the law of the place where it was made, and where the parties to it were domiciled, the defendants are not bound by it. I am not much impressed by the suggestion that inconvenience may be occasioned to insurance companies by having to ascertain the validity or invalidity of assignments according to foreign law. Taking into consideration the difficulties that may arise with regard to the validity of assignments according to English law, it does not seem to me that the difference caused by this additional difficulty is appreciable. In any case of assignment the office may have to settle for itself doubtful and complicated questions of fact, and there is nothing more in having to ascertain the law of a foreign country than in having to ascertain whether the assignment was in fact bonâ fide or for good consideration. I confess that I have felt some doubts with regard to the case, because I find it difficult to ascertain from the authorities cited what is exactly the principle to be deduced from them. If there were no authorities on the subject, as I have said, the rational view would appear to me to be that, this assignment being invalid according to the law of the country where it was made, and where the parties to it were domiciled, it must be treated as invalid here; and that, consequently, as the plaintiff's title to sue depends on such assignment, there must be, upon the question submitted to us, judgment for the defendants. The case of *Lebel* v. *Tucker* (1) has created some difficulty in my mind, but I have attempted to give what, rightly or wrongly, appears to me to be the explanation of that decision.

Judgment for the defendants.

Solicitor for the plaintiff: *Julius A. White.*

Solicitors for the defendants: *Street & Poynder.*

(1) Law Rep. 3 Q. B. 77.

E. L.

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April 5.

RODOCONACHI *v.* MILBURN BROTHERS.

Ship—Charterparty—Bill of Lading—How far controlling Charterparty—Measure of Damages—Advanced Freight subject to Insurance.

In an action against a shipowner by the vendor of goods sold "to arrive" for the loss of the goods, the measure of the damages is the price at which the goods were sold and not the market price at the port of destination on the day on which the ship would in due course have arrived.

A cargo of seed was shipped by the plaintiffs on the defendants' ship under a charterparty which provided, inter alia, that the master was to sign bill of lading at any rate of freight, and as customary at port of loading, without prejudice to the stipulations of the charterparty; sufficient cash for ship's disbursements to be advanced if required to the captain by charterers on account of freight, subject to insurance only. The bill of lading contained an exception, which was not in the charterparty, protecting the owners from liability for any act, neglect, or default of the master.

Money was advanced under the charterparty at the port of loading for disbursements. The plaintiffs did not insure this sum. The cargo was lost by the negligence of the master:—

Held, that the defendants were liable, that the clause in the bill of lading limiting their liability could not control the contract contained in the charterparty, but that the plaintiffs were not entitled to deduct from the freight due to the defendants the sum advanced subject to insurance, for that the meaning of that clause was that the shipowners were to allow to the shippers a sum equal to the premium payable on the insurance of the advanced freight, and that the plaintiffs could not, if they did not insure, deduct the money so advanced from the freight due to the defendants.

FURTHER CONSIDERATION.

Action brought by the charterers of and owners of a cargo of seed shipped on the *Redesdale* against the owners of that ship for damages for the loss of the cargo by the negligence of the master. The action was tried before Manisty, J., and a jury. The material clauses of the charterparty and bill of lading are set out in the judgment of Manisty, J. The ship and cargo were totally lost. The jury were asked whether there was a custom at Alexandria, the port of loading, to insert clauses in the bill of lading limiting the liability of the shipowners when there were no such clauses in the charterparty.

The jury answered this question in the negative, but said that the bill of lading was in the usual form.

They were also asked whether the charterers had agreed to accept the bills of lading as mere receipts for the cargo, and this question they answered in the affirmative.

The jury were then discharged by consent, the question of damages being left to the learned judge if he should hold that the defendants were liable.

Finlay, Q.C., and *Barnes*, for the plaintiffs.

Bigham, Q.C., and *Manisty*, for the defendants.

Cur. adv. vult.

April 5. MANISTY, J. This action was brought by the plaintiffs, who were the charterers of, and the shippers of a cargo in, a ship called the *Redesdale*, against the owners of that vessel, for the value, subject to certain deductions, of a cargo of cotton seed which was shipped by them at Alexandria for the United Kingdom. The cargo was lost by the admitted negligence of the master of the *Redesdale*.

The charterparty was entered into in November, 1884, the ship being chartered to go out to Alexandria and there load a cargo of cotton seed and other goods. She was loaded with cotton seed and was directed to proceed to a port in the United Kingdom and there deliver the cargo safely, subject of course to certain exceptions specified in the charterparty. These exceptions were "restraint of princes and rulers, dangers of the sea, machinery and navigation, fire, pirates and enemies, during the voyage always excepted." The charterparty contained a provision for freight, and clause 10 was as follows:—"The master to sign bill of lading at any rate of freight and as customary at port of lading without prejudice to the stipulations of this charterparty, receiving the difference if less than the rates specified therein at port of loading against his receipt for the same." The 13th clause was, "sufficient cash for ship's disbursements to be advanced if required to the captain by charterers on account of freight at current exchange subject to insurance only."

The cargo having been shipped, a bill of lading was signed by the master acknowledging that the cargo was shipped in good

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order and condition, and was to be delivered in a like condition at the port of destination, and then a number of exceptions were introduced which do not appear in the charterparty, the only material one of which is as follows: "or from any act, neglect, or default whatsoever of the pilot, master, or mariners being excepted, and the owners being in no way liable for any consequences of the causes above excepted." All other conditions were to be as per charterparty, so that no question arises on the clause as to signing bills of lading at any rate of freight.

The first question which I have to consider is, whether the defendants are liable for the loss of the cargo by the admitted negligence of the master, notwithstanding the exception in the bill of lading as to negligence, to which I have just referred. If that question ought to be answered in the affirmative, then it becomes necessary to decide whether the true measure of damages is the market value of the cargo at the port of destination at the time when the ship would in due course have arrived, which would be 7*l.* 7*s.* 6*d.* per ton, or whether it is the price at which the plaintiffs had sold the cargo to arrive, which would be 7*l.* 2*s.* 6*d.* per ton, less in each case such deduction as ought to be made on account of freight.

A third question is, what deduction ought to be made, assuming that the plaintiffs are entitled to recover, on account of freight. The plaintiffs claim to recover the price at which the cargo had been sold, less 575*l.* 3*s.* for freight, the whole freight being 735*l.* 3*s.*, because they advanced 160*l.* at Alexandria under the clause in the charterparty providing for advances for ship's disbursements, 5*l.* 5*s.* of this being allowed for insurance.

To take these questions in their order. The defendants would be liable, but for the exception in the bill of lading, because the charterparty does not contain any exception which covers the negligence of the captain and crew. The defendants, however, allege that they are protected by the clause in the bill of lading, and they vouched a custom which they say exists at Alexandria for the master to introduce such a clause into a bill of lading, although there is no such clause in the charterparty. I am of opinion that both upon the true construction of these two docu-

ments, and upon authority, the defendants are liable. The clause in the charterparty provides that "the master is to sign bill of lading at any freight." This provision is not an unusual one, for it is not known whether the charterers will ship the cargo themselves, whether the ship will be put up as a general ship, or whether a number of shippers may not ship various portions of the cargo. But I think that the provision must be taken in conjunction with the agreed freight so that the shipowners may not be deprived of the freight, which it has been contracted should be paid and received. It is not necessary to decide this, but I incline to the opinion that no custom could be proved as a legal custom which would have that effect.

I doubt whether there was in this case any evidence of any custom, such as that relied on by the plaintiffs, to go to the jury; but, assuming that there was some evidence, then I am of opinion that the jury came to a very proper conclusion in finding that no such custom had been established, for even if it is to be taken that the charterparty and the bill of lading constitute one contract, it is still necessary to consider what the primary contract between the charterers and the shipowners was, and then to see whether that has been changed by any other clause inserted in the charterparty. In this case the clause to which I have referred only gives power to sign bills of lading at any rate of freight without prejudice to the stipulations of the charterparty. Nor do I think that the words "as customary at port of loading" which are found in the same clause, mean anything more than that they are to be taken in conjunction with the clause which provides for signing bills of lading at any rate of freight without prejudice to the stipulations of the charterparty.

The words which follow confirm this view, as they point to the intention of the parties that bills of lading were to be signed without prejudice to the charterparty, for the words "receiving the difference" shew that the shipowners were to receive the full freight. I therefore hold that on this first point the defendants are liable.

I may refer upon this question to the case of *Gledstanes* v. *Allen* (1), which seems to be directly in point, and to *Wagstaff* v.

(1) 12 C. B. 202.

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Manisty, J.

Anderson (1), where Bramwell, L.J., said, at page 177, that the bill of lading was not a contract "superseding, adding to, or varying the former contract under the charterparty." That was, no doubt, a dictum, but Lord Bramwell repeated it in the House of Lords in *Sewell* v. *Burdick* (2), where he says: "There is, I think, another inaccuracy in the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given."

The second question is what damages are the plaintiffs entitled to recover. The true principle is laid down in *Hadley* v. *Baxendale* (3), and, applying that principle to the facts of this case, I think that the plaintiffs are only entitled to recover the price at which they had contracted to sell the cargo on arrival. If this cargo had arrived, the plaintiffs would have received £7 2*s.* 6*d.* a ton less deductions for freight. In *The Parana* (4) the cases on this subject are all examined, and though the judgment of Sir R. Phillimore was reversed in the Court of Appeal, the principle on which damages ought to be assessed was not doubted in either Court. I have not been able to find any case exactly similar to this case, but the facts in the American case of *Magnin* v. *Dinsmore* (5) are very nearly the same as those with which I have to deal. In that case the owner of goods shipped them to the consignee, giving him an option of taking and paying for them at a fixed price, or of returning them. An action was brought against the carrier for loss caused by his negligence, and it was held that the measure of damage was not the market value at the place of destination, but at most the price fixed by the parties as the price to be paid on delivery. "It seems," says Folger, J., at p. 45, "clear that the plaintiffs could not demand from the defendant more than would have resulted to them had the defendant made safe carriage and

(1) 5 C. P. D. 171.
(2) 10 App. Cas. 74, at p. 105.
(3) 9 Ex. 341.
(4) 1 P. D. 452; 2 P. D. 118.
(5) 62 New Y. Rep. 35.

prompt and correct delivery. In that case the plaintiffs would, at the farthest, have had from their consignees payment for all the goods sent at the price to the consignees fixed upon them by the plaintiffs. The sum of that price with interest thereon from a day when the goods should in usual course of carriage have reached the consignees and been accepted by them, will make the damage which would naturally and proximately result to the plaintiffs. Though the rule is sometimes stated thus: that the damages are the value of the goods agreed to be carried and delivered at the place and time of delivery; that rule is but a branch of the more general one, that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of the contract: *Sturgess* v. *Bissell.* (1) When the owner and shipper of the goods is himself to take the goods at the place of destination, and there sell them for his own account for what they will there bring, the market value there is the measure of his damages, because that would have been his benefit from performance of the contract. But every case is governed by its own facts, and here the price of the goods at the place of destination was fixed by the plaintiff before they were committed to the carrier."

I have had more doubt on the third question, which is as to what deduction ought to be made for freight. The 160*l.* was no doubt advanced freight, and therefore it could not be recovered back. It was not a loan, and the shipowners could not insure it. But the clause says for ship's disbursements on account of freight subject to insurance only. This means that the shipowners are to pay to the charterers a sum equal to the premium which they would have to pay for insurance, for the charterers could insure that sum of money if they chose. It means that the shipowners agree to pay to the charterers a certain sum of money to enable them to insure, that the charterers are therefore not to look to the shipowners, but to their rights under their contract of insurance.

If the plaintiffs had insured the 160*l.*, and the cargo had been lost, it could not be said that they could recover that both from the insurers and from the shipowners.

(1) 46 New Y. Rep. 462.

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Suppose that the sum to be advanced had been 4000*l.*, that the premium for insuring this sum had been paid by the shipowners, it could not be supposed that the shippers could be entitled to put that sum into their pockets, and also to look to the shipowners for the 4000*l.*

I do not find any direct authority on this point, though I have looked at the cases on general average, but I think that there are authorities which support this view, though they do not exactly cover it. *Frayes* v. *Worms* (1) seems to me to bear strongly on this question, while *Jackson* v. *Isaacs* (2) is also in point. In that case freight was payable subject to insurance. The advanced freight had not been insured. The shipowner sued for the agreed freight, and it was held that it was no defence for the shipper that he had not insured the freight. Bramwell, B., said: "As a matter of construction I have no doubt as to the meaning of the contract, viz., that the advance of freight was to be subject to an allowance for the premium on the policy of insurance. But the plea is bad in any view. If the defendant insured the freight for 500*l.* he would be entitled to recover the whole amount from the insurer. If Mr. James's argument is right, the plaintiff is not entitled to be paid the entire amount of the freight, but a sum minus the premium on the policy;" and Watson, B., said: "There is no doubt what is meant by this stipulation. It provides for a payment of freight in advance: *De Silvale* v. *Kendall.* (3) The defendant, then, is the only person who would" (it ought to be who could) "have insured the freight. It, therefore, seems clear that the payment by the defendant was to be subject to a deduction for the expense of the insurance which he was to effect."

That case is a direct authority for saying that the bargain between the parties in this case was such as I have stated. I am unable to agree with a passage in Lowndes on General Average, where he says, at page 255 of the 2nd edition, cash to be advanced by the charterer subject to insurance "is regarded by the Courts as meaning no more than that the shipowner allows the charterers the cost of the insurance by way of bonus or compensation for his making the advance."

(1) 19 C. B. (N.S.) 159. (2) 3 H. & N. 405. (3) 4 M. & S. 37.

I do not think the case of *Hicks* v. *Shield* (1) and the other cases cited by the writer support that statement. They only shew that it is not a loan, that it is not insurable by the shipowners, and that it is only insurable by the shipper.

I, therefore, give judgment for the amount of the cargo at 7*l.* 2*s.* 6*d.* a ton, which amounts to 8511*l.* 13*s.* 1*d.*, less 735*l.* 3*s.* instead of 575*l.* 3*s.*, for I include the 160*l.* advanced freight, and that reduces the amount to 7776*l.* 10*s.* 1*d.*, with interest from the day on which the writ was issued, that is the 28th of January, 1885.

Judgment accordingly.

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*

Solicitors for defendants: *W. A. Crump & Son.*

R. B. R.

[CROWN CASE RESERVED.]

June 24.

THE QUEEN *v.* SHURMER.

Criminal Law—Evidence—Deposition, Admissibility of—30 & 31 *Vict. c.* 35, *ss.* 6, 7—*Notice of Intention to take Deposition.*

The 6th section of the 30 & 31 Vict. c. 35, provides in cases of indictable offences for the taking of the statements on oath or affirmation of persons dangerously ill and not likely to recover, and for the reading of the same in evidence under certain circumstances, "provided it be proved to the satisfaction of the Court (inter alia) that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence:—

Held (by Lord Coleridge, C.J., and Denman, Field, and Mathew, JJ., Day, J., dissenting), that the notice intended by the section is a notice in writing, and that such a statement was inadmissible against a prisoner where he had only had oral notice of the intention to take the same, although he was present when the statement was taken.

CASE stated by Hawkins, J., the facts of which were in substance as follows:—

The prisoner was indicted at the Swansea Assizes, May, 1886, for a rape upon a girl who had since died. On the part of the prosecution a statement on oath of the deceased girl, purporting

(1) 7 E. & B. 633.

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to have been taken in accordance with the statute 30 & 31 Vict. c. 35, s. 6, was tendered in evidence against the prisoner.

Objection was taken to it by the prisoner's counsel, on the ground that there was no evidence that reasonable notice of the intention to take such statement had been served on the prisoner as required by 30 & 31 Vict. c. 35, s. 6.

Neither the magistrate before whom the deposition was taken nor his clerk was present at the Assizes, but it was stated by a police-sergeant, who was called, that he arrested the prisoner on the 18th of February on the charge of rape; that he was taken to the police station and there detained in custody until the 20th, when, the girl being then very ill in her father's house, it was determined to take her statement there under the statute above mentioned; that he, the police-sergeant, on that day took the prisoner from the police station to the house, telling him that he was taken there for the purpose of taking the girl's statement, to which he said nothing; that he was taken into the room, where were present the magistrate, his clerk, and the girl; that the girl was then in the prisoner's presence told by the clerk that they had come to take her statement in writing; that she was duly sworn and made her statement, which was written down by the clerk; that it was afterwards read over to and signed by her; and that during the whole time the prisoner was present, and could see and hear all that took place.

It was contended for the Crown that, the prisoner being in custody on the charge upon which he was subsequently tried, and present when the statement was taken, no notice of the intention to take it was necessary, the object of the statute in requiring notice being only to give the person to be affected by the statement an opportunity of being present, as in this case he was; and that the prisoner had in fact notice of the intention to take such statement, inasmuch as the police-sergeant told him expressly that he was being taken to the house for the purpose of taking it, and that a verbal notice was sufficient. The judge found that, if such a notice as is mentioned in s. 6 was essential to the admissibility of the statement, and if verbal notice is sufficient, then it must be taken to have been proved to his satisfaction that reasonable notice of the intention to take such

statement was served on the prisoner before the statement was taken.

The judge admitted the deposition, reserving the point whether it was admissible, and the prisoner was convicted.

No counsel appearing for the prisoner,

T. Marchant Williams was heard for the Crown in support of the conviction. The sole object of the Act in requiring the notice to the prisoner of the intention to take the deposition is that the prisoner may be present so as to have an opportunity of cross-examining. The prisoner in this case having been present, it is contended that any informality in the mode of giving the notice became immaterial. It is also contended that a notice in writing is not requisite. A notice may be served orally.

DAY, J. It is with great distrust of the correctness of my own view that I differ from the conclusion at which I understand my learned Brothers to have arrived, but I feel bound to express the opinion which I have formed. The question whether this deposition was admissible in evidence depends upon the terms of the 30 & 31 Vict. c. 35. That statute does not in terms require that the notice of the intention to take the deposition shall be in writing, though it does speak of it as to be served. The word "served" is a somewhat ambiguous one. When service of a writ is spoken of, service of a written instrument is necessarily contemplated, because a writ is a written instrument. But, when the term "served" is used in reference to a notice, it does not seem to me necessarily to follow that the notice must be in writing. In this case the judge finds that the prisoner had reasonable notice; he made no objection on the ground that he had not received a sufficient notice; and he was present at the taking of the deposition. When the statute means to make a written instrument necessary, it says so in terms. By the 7th section, where the person accused is in custody, it is expressly provided that a magistrate is to make an order in writing for his conveyance to the place where the statement is to be taken. In my opinion the deposition was admissible and the conviction should be sustained.

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LORD COLERIDGE, C.J. The remainder of my learned Brothers and myself differ from the view taken by my Brother Day. It may possibly be that under certain conditions there would be no objection in principle to an oral notice, but the question is, what has the statute said on the subject? The 6th section of the Act says that it shall be lawful to read the statement in evidence "provided it be proved to the satisfaction of the Court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence." Such being the words of the section, which make the notice a condition precedent to the admissibility of the evidence, it is very material to consider the words of the 7th section as throwing light on the question whether the 6th section contemplates an oral notice, although, according to the usual meaning of words, such a notice cannot be served, or renders a written notice essential. The 7th section says that, "whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may by an order in writing direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement." I should have thought that any person, whether a lawyer or not, would say that on the fair and reasonable construction of those sections taken together a written notice is contemplated by the Act. It may be that a notice given to a person verbally might produce the effect desired to be secured as well as one in writing, but we are bound by the words of the section, and they are not "given to" but "served upon." I think it would be straining these words to make them equivalent to "given to." I am not prepared to say that, having regard to the context, it might not be possible in some cases that they should have that meaning, but the question is, what is really meant by them in this Act? The power to read the deposition in evidence is a power beyond the ordinary course of the common law, and I think that the safer and better construction of the provisions is that this power can only be exercised when a written notice of the intention to take the

statement has been served. If the notice is not in writing, how is the magistrate, who is to make the order under the 7th section empowering the gaoler to convey the prisoner to the place where the statement is to be taken, to know what place is mentioned in the notice? He would have to hear evidence as to what the notice given was, which would be a most inconvenient mode of procedure. For these reasons I think that the statement was not admissible, and therefore that the conviction must be quashed.

DENMAN, FIELD, and MATHEW, J.J., concurred with the Lord Chief Justice.

Conviction quashed.

Solicitor for the prosecution: *G. Mayor Cooke, for E. G. Davies.*

E. L.

[CROWN CASE RESERVED.]

June 24.

THE QUEEN *v.* STROULGER.

Criminal Law—Indictment, Form of—Election Law—Corrupt Practice—Description of Offence charged—Corrupt Practices' Prevention Act, 1863 (26 & 27 *Vict.* c. 29), *s.* 6—*Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict.* c. 51), *ss.* 3, 6, 53.

The prisoner was tried and convicted upon an indictment which alleged that at an election for members of parliament for the borough of Ipswich holden on the 25th of November, 1885, he was guilty of corrupt practices against the form of the statute in that case made and provided. It was proved at the trial that he had promised money to two voters to induce them to vote. After verdict the objection was taken by the prisoner's counsel that the indictment was bad, because it did not sufficiently describe the nature of the offence with which the prisoner was charged:—

Held (by Lord Coleridge, C.J., and Field and Mathew, JJ., Denman and Day, JJ., dissenting), that, if the indictment were defective, the defect was cured after verdict.

By Lord Coleridge, C.J., and Denman, Mathew and Day, JJ., the indictment was defective, and on application before verdict might have been quashed.

By Denman and Day, JJ., the defect in the indictment was not cured after verdict.

By Field, J., *semble*, the indictment was good by virtue of 26 & 27 Vict. c. 29, s. 6, and 46 & 47 Vict. c. 51, s. 53.

CROWN CASE RESERVED, the facts of which were as follows:—

The prisoner was tried at the spring assizes at Ipswich before

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Pollock, B., on an indictment which alleged that he was, at an election for members of parliament for the borough of Ipswich holden on the 25th of November, 1885, guilty of corrupt practices against the form of the statute in that case made and provided. It was proved in evidence that he had promised money to two voters to induce them to vote. The jury found the prisoner guilty of corrupt practices by offering money for votes. After verdict it was objected by the counsel for the prisoner that the indictment was bad, because it did not sufficiently describe the nature of the offence with which the prisoner was charged. The learned judge thought the indictment good after verdict, but respited judgment and reserved for the Court the question whether after verdict the indictment was good.

Cock, Q.C. (*F. K. North,* with him), for the prisoner. The indictment was bad, and the defect was not cured by verdict. The indictment does not state an offence in a defective or imperfect manner. It does not state an offence at all. There is no such offence specifically known to the law as a "corrupt practice." The expression "corrupt practice" is not a compendious description of a particular offence like the expression "burglary." It is a general description of a group of offences consisting of very different offences, some of them being felonies, and some of them misdemeanors. See Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), ss. 3, 6. It is true that s. 3 says that the expression "corrupt practice" shall mean certain offences for the purposes of the Act, but the interpretation so given does not apply to an indictment. There is no provision anywhere that any offence included by the Act under the term "corrupt practice" may be described in an indictment by the expression "corrupt practice." It is quite obvious that at common law such a statement of the charge in an indictment would be wanting in all the necessary elements of particularity.

[FIELD, J.:—Is not this an imperfect statement of an offence?]

It is submitted that the expression is no legal statement of an offence at all, but merely a description of a class of offences. The 53rd section of 46 & 47 Vict. c. 51, incorporates the 6th section of 26 & 27 Vict. c. 29, and provides that the provisions

of that section shall extend to indictments for corrupt practices; but the terms of that section, as applied to corrupt practices, do not sanction a description of the offence by the general expression "corrupt practice;" on the contrary that section provided for a description of the nature of the particular offence, though it might be so described without details by a general term applicable thereto, such as "bribery," "treating," or "undue influence." The 6th section of 46 & 47 Vict. c. 51, provides that any corrupt practice other than personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation shall be a misdemeanor, but that the offence of personation or aiding, abetting, counselling, or procuring the commission of the offence of personation shall be felony. It is impossible to tell from this indictment whether the prisoner was charged with and found guilty of a felony or a misdemeanor.

[DENMAN, J.:—Possibly it might be contended that, as the indictment did not contain the word "feloniously," it must be construed as charging a misdemeanor only.]

There is no legal offence called "corrupt practices" any more than there is any legal offence called "felony." It is merely nomen collectivum. This indictment charging no legal offence, its defectiveness is not cured by verdict, and no judgment can be pronounced upon it.

McIntyre, (*H. Stephen*, with him), for the prosecution. This indictment is free from objection. By the Acts prior to 1883 bribery was made an offence eo nomine, and so was treating and undue influence. The 46 & 47 Vict. c. 51 has the effect of abolishing the old offences of bribery, &c., as such (see s. 6 and Sched. V., which repeals in part the 17 & 18 Vict. c. 102, ss. 2, 3, 4, and 5), and constituting by s. 6 a new offence, viz., a "corrupt practice," which includes bribery. Bribery is now an offence, as being a corrupt practice. The 53rd section extends to charges of corrupt practices the provisions of s. 6 of 26 & 27 Vict. c. 29, and it is contended that the fair construction of the legislation is that just as, when "bribery" was specifically an offence, the indictment might allege bribery generally; so now, when the offence is a corrupt practice, a corrupt practice may be alleged generally.

Secondly, if there was any objection to the indictment, it was

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cured by verdict. At the utmost the indictment was only uncertain, and after verdict it must be presumed that the evidence sufficiently shewed a specific offence, which was a corrupt practice. He referred on this point to the notes to *Stennel* v. *Hogg* (1) and *Reg.* v. *Goldsmith.* (2)

Cock, Q.C., in reply. The 6th section of 46 & 47 Vict. c. 51, with regard to "corrupt practices" that are indictable offences, makes no express provision that it shall be sufficient to describe the offence as a corrupt practice; but the 3rd sub-s. of s. 53, which deals with "illegal practices" which are not indictable, provides that they may be described generally as illegal practices. On the principle expressio unius, alterius exclusio, this is conclusive to shew that the legislature has not sanctioned an indictment in this form.

DAY, J. There being, I am sorry to say, a difference of opinion in the Court, I have to deliver judgment first. The questions we have to consider are, first, whether this was a good indictment; and, secondly, if it was not, whether its defects are cured by verdict. In my judgment the indictment is bad, on the ground that no offence is therein stated with anything like reasonable certainty. The prisoner is charged generally with being guilty of corrupt practices. There is no such specific offence known to the law as a corrupt practice. A number of separate and specific offences are corrupt practices, some of which are misdemeanors, and one a felony. This is not the case of a defective description of a specific offence. There is no attempt to specify any offence. It seems to me very much as if the prisoner were charged with felonies or with misdemeanors generally. For these reasons I think the indictment was bad, and should, if application had been made, have been quashed before verdict. Then the second question is whether its defects are cured by verdict. I do not see how such a defect as this can be so cured. The jury have found the prisoner guilty of corrupt practices, but I do not see how they can be taken to have found him guilty of any specific offence upon such an indictment. In my opinion it would be impossible after verdict to make up the record in such a case so as to shew

(1) 1 Wm. Saund. Ed. 1871, p. 260. (2) Law Rep. 2 C. C. R. 74.

what judgment ought upon such record to be pronounced. I do not think that the uncertainty of this indictment is of the character that is cured by verdict. The uncertainty that is so curable is where there is an imperfect description of a specific offence. Here the uncertainty arises from the fact that the indictment fails to specify any offence at all. For these reasons I think that the conviction should be quashed.

MATHEW, J. It is necessary to ascertain what is the reasonable construction of this indictment. It contains a general charge of corrupt practices, by which I think must be included all the corrupt practices specified in the Act. The real objection to such an indictment seems to me to be an objection on the ground of multifariousness, and, if at the proper stage of the proceedings the appropriate steps had been taken for that purpose, I think the indictment ought to have been quashed. That course was not taken, but the prisoner took his trial and was found guilty in fact on certain specific charges of bribery. It appears to me that after verdict the imperfect statement of the offence in the indictment is cured and the conviction is good. In addition to the authorities cited before us I refer in support of the conclusion at which I have arrived to the case of *Reg.* v. *Aspinall* (1), and 1 Chitty on Pleading, p. 714.

FIELD, J. I propose to treat this case as it was treated at the bar, and as we clearly have jurisdiction to treat it on a case reserved, viz. as though it arose on motion in arrest of judgment. The question is whether such a motion ought to be successful. I think not. In my judgment the indictment is good; but, if it be defective by reason of its not sufficiently specifying the offence charged, then I think its defects are supplemented by the verdict and the conviction is good. At common law such an indictment would clearly have been bad, and would have been liable to be quashed; but, so far as I can judge, an indictment in such a form as this has in this case been sanctioned by the legislature. It was necessary at common law to set out in an indictment various details with much particularity. This form of indictment was

(1) 2 Q. B. D. 48.

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well enough adapted to simple cases, such as cases of larceny, but it was found very inconvenient as applied to a number of more complex offences, and so provisions have been not unfrequently made by which the prosecution has been freed from the obligation of stating the offence with the ancient strictness and allowed to state it more generally. It is quite clear that under the 6th section of 26 & 27 Vict. c. 29, bribery might have been alleged generally. The question is whether the 53rd section of the Act of 1883 (46 & 47 Vict. c. 51) has not rendered admissible in regard to charges of corrupt practices the same generality of expression which, under s. 6 of 26 & 27 Vict. c. 29, was admissible with regard to bribery. I am disposed to think that it has. It is to be observed, as the counsel for the prosecution pointed out, that the effect of ss. 3 and 6 of the Act of 1883 (46 & 47 Vict. c. 51) is that bribery is not now made punishable specifically as bribery but as being included in the term "corrupt practice." Assuming that, the indictment charging corrupt practices, there possibly might be an objection on the ground of duplicity, I do not think that would be any ground for arresting the judgment. I am for these reasons at present of opinion that the indictment is good, but it is not necessary for me to decide the point, for, if it be defective, I am clearly of opinion that, on the principles laid down in the notes to *Stennel* v. *Hogg* (1) and *Reg.* v. *Goldsmith* (2), the defect is cured by the verdict, for after verdict it must be assumed that a specific offence coming under the head of corrupt practices was satisfactorily proved against the prisoner.

DENMAN, J. I think that the indictment was bad. It alleges generally that the prisoner was guilty of corrupt practices, but does not state of what corrupt practices he was guilty. There are various sorts of corrupt practices, some being felonies and some misdemeanors. It was argued that the statute of 1883 has abolished the term "bribery" as the specific legal description of an offence, and left only the offence of a "corrupt practice" of which bribery is one instance. I am not prepared to assent to this argument. I think, when the statute of 1883 speaks of the expression "corrupt practice" as meaning certain things, it only

(1) 1 Wm. Saund. Ed. 1871, p. 260. (2) Law Rep. 2 C. C. R. 74.

means to interpret the expression as used for the purposes of that Act and to establish for convenience of reference in other sections a nomen generale covering a number of specific offences; but in order that an indictment may be good I think it must specify which particular offence the prisoner is charged with out of the various offences comprised in the general expression "corrupt practice." Reliance has been placed on certain sections of the Acts relating to corrupt practices as sanctioning this form of indictment. The effect of the 6th section of 26 & 27 Vict. c. 29, seems to be merely to enable a person charging the offence of bribery, treating, or undue influence to charge the offence in general terms by stating that the accused was guilty of one of these offences, as the case might be, naming it. I do not find anything in any of the subsequent statutes to affect or extend this provision. Section 53 of 46 & 47 Vict. c. 51, does not seem to me to have the effect suggested by the counsel for the prosecution. It merely enacts that s. 6 of the Act of 1863 shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act. When s. 6 is looked at, it appears that the offence is to be charged as "bribery," "treating," or "undue influence" "(as the case may require)." It seems to me that these words shew that the indictment must specify the particular sort of corrupt practice that is charged. I think that it would be stretching the words of the enactments to hold that they justify such a form of indictment as this. I am confirmed in this conclusion by the words of sub-s. (3) of s. 53, which provides in relation to illegal practices that "on any such prosecution or action as aforesaid it shall be sufficient to allege that the person charged was guilty of an illegal practice." I think that these later words of the section specifically providing that an illegal practice may be charged generally as such, according to the well established rules of construction, exclude the contention that the Act meant that a corrupt practice might be charged generally as such.

The second question is whether the defect in the indictment is cured by verdict. I by no means say that I have made up my mind whether, if the jury had in so many words found the

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prisoner guilty of bribery, such a verdict would have cured the insufficiency of the indictment. I am disposed to think it would not, but I do not decide that question. I do not think that is what the jury have done. The jury have found the prisoner guilty of corrupt practices. It does not seem to me that under the circumstances it sufficiently appears from the verdict of what corrupt practice the jury found the prisoner guilty. For these reasons I think the conviction ought to be quashed.

LORD COLERIDGE, C.J. The prisoner was indicted for and found guilty of corrupt practices, and the question is whether the conviction can stand. It is necessary to consider the provisions of the Corrupt Practices Prevention Acts in relation to this question. The Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 3, says that the expression "'corrupt practice' as used in this Act means any of the following offences, viz., treating and undue influence as defined by this Act, and bribery and personation as defined by the enactments set forth in Part III. of the 3rd schedule to this Act, and aiding and abetting, counselling and procuring the commission of the offence of personation." Construed by the light of this definition the meaning of this indictment would in strictness be that the prisoner was guilty of some of the offences mentioned in that section. I am clearly of opinion that, if the objection had been taken at the proper time, it must have prevailed, because, as "corrupt practices" may mean any of several offences, some of which are felonies and some misdemeanors, it would, as it seems to me, be impossible to hold that this indictment described the offence with reasonable certainty. It appears to be the view of one of my learned Brothers, for whose opinion I entertain the greatest respect, that the indictment is good by reason of the effect of s. 6 of 26 & 27 Vict. c. 29, as incorporated by s. 53 of 46 & 47 Vict. c. 51. But I apprehend that the true view of the effect of those provisions is that, in cases of charges of corrupt practices under the later Act, the offence may be described in general terms as bribery, treating, undue influence, or personation, and such general description will be sufficient; but that, as

the earlier Act requires in the case of a person charged with an offence under that Act the use of the term "bribery, treating, or undue influence" (as the case may require), so under the Act of 1883, the indictment must state which of the corrupt practices mentioned in the Act is charged, as the case may require. Therefore I think that the generality of the indictment in this case would have been too great if the objection had been taken in time.

But the further question remains, whether this conviction can stand. It is familiar knowledge that there are many cases in which the conviction will stand, though there is an objection to the indictment, which, if taken in time, would have been fatal. The reasons for this are well stated in the notes to the case of *Stennel* v. *Hogg* (1), where it is said: "With respect to the former case it is to be observed that, where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law; or, in the phrase often used upon the occasion, such defect is not any jeofail after verdict." It seems to me that the principle there laid down covers a case like the present, where, an offence being charged in general terms which include various specific offences, the case proceeds, in fact, on one particular charge, and the jury find a verdict of guilty; and that it may be presumed in such a case that the jury found the verdict on the charge actually preferred, and that the judge would not have directed the jury to give, and the jury would not have given, the verdict, unless there had been satisfactory proof at the trial of such charge. It seems to me that, as the prisoner has been found guilty of "corrupt practices," and that is a term which includes the offence of which he was really accused, for which he was in fact tried, and on which the jury in truth gave their verdict, all the elements necessary to sustain such a

(1) 1 Wm. Saund. Ed. 1871, p. 261.

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conviction after verdict were present, and therefore that the conviction should be affirmed.

Conviction affirmed.

Solicitors for the prosecution: *Solicitors to the Treasury.*

Solicitors for the prisoner: *Aldridge, Thorn, & Co., for Jennings, Ipswich.*

E. L.

June 9.

BLAIBERG *v.* PARSONS.

Bill of Sale—Power of Sale on Default—Provision excusing Purchaser from Inquiry as to Default—Bills of Sale Act (1878) *Amendment Act,* 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule, Deviation from.*

A bill of sale which contains a provision that a purchaser on a sale after default in payment of an instalment due under the bill of sale, shall not be bound to inquire whether any such default has been made, is void, as substantially deviating from the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9.

APPEAL from a decision of the judge of the County Court of Essex on an interpleader issue.

The plaintiff in the issue claimed under a bill of sale given by the execution debtor goods which had been seized in execution.

By the bill of sale the grantor assigned to the plaintiff the goods by way of security for a loan payable by instalments, and it contained, amongst other provisions, a power of sale upon default in payment of any of the instalments, and a provision that "upon any such sale the purchaser shall not be bound to see or inquire whether any such default has been made as aforesaid."

The judge held the bill of sale to be void on the ground that the introduction of this clause was a departure from the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43).

Reed, for the plaintiff. The clause to which objection is taken is inserted to protect the borrower as well as the lender. A similar clause has been inserted in mortgage deeds: *Dicker* v. *Angerstein.* (1) It is a clause for the maintenance of the security, and

(1) 3 Ch. D. 600.

there is, therefore, no substantial departure from the form given in the schedule: *Consolidated Credit Corporation* v. *Gosney*. (1)

Poyser, for the defendant, the execution creditor, was not called on.

LORD COLERIDGE, C.J. I am of opinion that the argument for the claimant cannot succeed. This bill of sale contains an addition to the form given in the schedule to the Act. A proviso is added which states that a purchaser need not inquire whether default has or has not been made by the grantor, and such a proviso seems to me not to be in accordance with the form. The decisions on this point lay down the principle that a certain amount of latitude may be permitted, and that terms which are merely explanatory may be inserted in a bill of sale; but the provision which has been here inserted goes far beyond that principle. It is argued that the clause really is a clause for the maintenance of the security, but as the clause makes it more easy for the grantee to realize the goods by sale, it appears to me that it cannot be considered to be merely a clause added in order to maintain the security. In *The Consolidated Credit Corporation* v. *Gosney* (1) the inserted clause related to the substitution of fresh articles in the place of articles which might be worn out, so that it was clearly a clause for the maintenance of the security; but the clause which we are now considering is really a clause for the benefit of the grantee, and the decision of the county court judge must be affirmed.

CAVE, J. I am glad that this case has come before my Lord, who is so well acquainted with the provisions and objects of the statute, and I do not desire to dissent from the judgment he has delivered, although I am not sure that I quite know what the phrase "in accordance with the form" imports.

Judgment for the defendant. Leave to appeal refused.

Solicitors for plaintiff: *Hill & Co.*
Solicitor for defendant: *W. Scott Lawson.*

(1) 16 Q. B. D. 24.

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HOPE *v.* EVERED.

Malicious Prosecution—Malicious Application for Search Warrant—Criminal Law—Reasonable Cause for Suspicion—Judicial Act—48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 10.

By 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 10, it is provided that "if it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorizing any person named therein to search for . . . such woman or girl":—

Held, that under this section the justice has a judicial duty to perform, and that his decision that there is reasonable cause for such suspicion is a protection to a person who bonâ fide applies for a search warrant, and is an answer to an action for maliciously causing the warrant to issue.

ACTION for maliciously and without reasonable and probable cause laying a complaint and information before a justice and procuring him to grant a warrant to search the plaintiff's house, on the ground that there was reasonable cause to suspect that the defendant's daughter was detained there by the plaintiff's son for immoral purposes. At the trial before Manisty, J., the learned judge held that there was an absence of reasonable and probable cause for the defendant's act, and left the question of malice to the jury, who found for the plaintiff. It is unnecessary to set out the facts of the case, which is only reported on a point of law that was not argued at the trial. The application for a search warrant by the defendant was made under 48 & 49 Vict. c. 69 (the Criminal Law Amendment Act, 1885), s. 10, which is set out above.

Buszard, Q.C., and *W. Graham*, moved to enter judgment for the defendant or for a new trial. This action will not lie. The statements of the defendant in the information are admittedly true, and must be taken to be the only statements made by her in the absence of any evidence to the contrary. Under s. 10 of the Criminal Law Amendment Act, 1885, the duty of deciding whether

there is reasonable cause for the issuing of the warrant is cast upon the justice; he has a judicial, not a merely ministerial, duty to perform, and unless the defendant told the justice what was false she is not responsible for his wrong decision. No charge was made against the plaintiff himself, and there is a broad distinction between an application for a search warrant and an information charging a person with a criminal offence: *Wyatt* v. *White*. (1) All that is necessary under this section is that the applicant should state the grounds of his suspicion; and if the magistrate is satisfied that they are reasonable, then, in the absence of mala fides on the applicant's part, there is no remedy for the issue of the warrant; there is no power to go behind the decision of a duly constituted tribunal without appeal.

Hextall (*Lawrance, Q.C.*, with him), for the plaintiff. The mere fact that the magistrate has a judicial, and not a merely ministerial, duty to perform in granting a search warrant does not disentitle the plaintiff to maintain this action: *Cooper* v. *Booth* (2) (cited arguendo as *Boot* v. *Cooper*, at 1 T. R. 535). It is true that in that case the statutes under which the excise officers applied for a search warrant (10 Geo. 1, c. 10, s. 13), did not cast upon the commissioners of excise the duty of giving a judicial decision in such clear language as is used in the present statute with respect to the justice; but it is clear from the finding in the special verdict, "the commissioners, being satisfied with the reasonableness of his suspicion, did grant a warrant," that the duty which they had to perform was not merely ministerial. It is clearly laid down by Lord Kenyon, C.J., in that case that an action on the case would lie against the excise officer for obtaining or executing the warrant from bad motives; and in the present, assuming the defendant to have acted from a mixed motive, the mere fact of her acting bonâ fide up to a certain point would not protect her.

Buszard Q.C., in reply.

LORD COLERIDGE, C.J., after stating the facts of the case, and holding that the learned judge at the trial was wrong in ruling that there was an absence of reasonable and probable cause for

(1) 29 L. J. (Ex.) 193. (2) 3 Esp. 135.

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the act of the defendant, proceeded as follows:—We have to deal with a recent Act of Parliament giving unusual powers, and pointed at an evil which the legislature thought sufficiently important to be met by this enactment. Now s. 10 of that Act provides (I omit the portions immaterial to this case) that if it appears to any justice of the peace, on information made before him on oath by any parent of any woman or girl, or [by] any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within his jurisdiction, he may issue a search warrant. The Act of Parliament therefore casts on the magistrate (and if legislation of this nature is to be effective, most properly so) the onus of its being made to appear to him that there is reasonable cause that the girl is being detained for immoral purposes. If the person who puts the magistrate in action only states the grounds of his suspicion and says that on those grounds he reasonably suspects that the girl is improperly detained, and if the magistrate agrees with him and thinks that it has been made to appear to him that a person acting bonâ fide has reasonable cause for his suspicion, then that decision of the magistrate is an answer to such an action as the present. The magistrate has to act judicially. I do not, however, suggest for an instant that this action would not lie against a person who, desiring to use the powers given by this Act for purposes of oppression, and knowing that he had no reasonable cause for suspicion, in a false and fraudulent manner obtained the issue of a search warrant; but where bona fides is present, and the matter is stated fully and fairly to the magistrate and he concludes that there is reasonable ground for the applicant's suspicion, then his conclusion is an answer to any proceeding. It is not because people are sometimes illogical, and parents unreasonably anxious, and the wrong house occasionally searched, that the salutary operation of an Act (salutary I mean in the view of the legislature) is to be checked by actions of this description; otherwise it would not be safe to put this Act in force. There is no question here of the infringement of the liberty of the subject; it is merely provided that there shall be a right to

search a house in order to effect what in the view of Parliament is a great good. Both on the facts and on the true construction of this Act of Parliament I am of opinion that there was no ground for leaving this case to the jury.

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MATHEW, J., concurred.

Judgment for defendant.

Solicitor for plaintiff: *E. Warriner, for Mole & Stone, Derby.*

Solicitors for defendant: *Cowdell & Co., for C. K. Eddowes, Derby.*

W. J. B.

ROBINSON *v.* DAND.

June 8.

Ecclesiastical Law—Incumbents' Resignation Act, 1871 (34 & 35 *Vict. c.* 44), *ss.* 8, 10, 11—*Pension to retiring Incumbent—"Net Annual Value" of Benefice.*

By s. 8 of the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), it is provided that the pension which may be allowed to a retiring incumbent shall in no case exceed one third part of "the annual value of the benefice resigned"; and by s. 11 the annual value for the purposes of the Act is defined to be the "net annual value" after making certain deductions therein specified:—

Held, that the amount of the retiring pension is to be fixed with reference to the net annual value of the benefice at the date of the incumbent's resignation; and that, having been once fixed, it is not liable to subsequent alteration in consequence of a diminution in the net annual value of the benefice through agricultural depression or through the formation of a part of the parish into a district chapelry.

SPECIAL CASE, stated by consent of the parties, the material facts of which are as follows:—

The Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), which enables clergymen permanently incapacitated by illness to resign their benefices with a pension, provides by ss. 7, 8, that the bishop shall cause a commission to be issued, and that the commissioners in their report shall specify the amount of pension which, in their opinion, ought to be allowed out of the revenues of the benefice to the retiring incumbent, "provided that in no case shall such pension exceed one-third part of the annual value of the benefice resigned." By s. 11 the "annual value" is

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defined to be "the net annual value" of the benefice after making the deductions therein specified.

The plaintiff, who was in 1881 the incumbent of the parish of Chieveley, in the diocese of Oxford, being desirous of resigning his living, a commission was appointed by the bishop, which duly made its report; and the bishop, acting on the recommendations contained therein, made a declaration, under s. 9 of the Act, in which he declared the benefice to be void, subject to the payment to the plaintiff, by half-yearly payments out of the revenues of the benefice, of a yearly pension of 400*l.*, being somewhat less than one-third of the annual value of the living at that time. The defendant is the plaintiff's successor in the incumbency of Chieveley, and up to and including the half-year ending the 26th of May, 1885, had paid to the plaintiff the annual pension of 400*l.* by half-yearly payments of 200*l.* less income tax.

By an Order in Council of the 28th of December, 1882, a portion of the parish of Chieveley was formed into a district chapelry, and the revenues of the district chapelry have been paid to the minister thereof and not to the defendant, who has ceased to provide for the services and offices in the chapelry. No provision was made by the Order in Council for charging upon the revenues of the district chapelry any part of the plaintiff's pension.

By reason of the abstraction of the revenues of the district chapelry, and of the reduction in value of the yearly tithe rent-charge and of the glebe rents through agricultural depression, the revenues of the benefice of Chieveley have fallen in value since the plaintiff's resignation, the net annual value for the year ending the 26th of November, 1885 (exclusive of the district chapelry), being 1105*l.* 11*s.* 11*d.*, while its net annual value, inclusive of the district chapelry, was 1200*l.*

The question for the opinion of the Court was whether the amount of pension named in the declaration of the 25th of October, 1881, was still payable by the defendant to the plaintiff, notwithstanding the diminution in value of the revenues of the benefice, owing to the formation of the district chapelry and to agricultural depression.

The Court held that the burden of proof lay on the defendant, and called on

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Arthur Charles, Q.C., and *Bargrave Deane*, for the defendant. The amount of pension fixed by the bishop's declaration is not fixed for the life of the retiring incumbent. Inasmuch as the pension is a charge on the benefice, and the spiritual duties must be discharged, the obvious intention of the proviso in s. 8 is to prevent the pension from eating up the whole of the revenues by fixing it at one-third of the net annual value, which means the annual value from year to year. The legislature has not said that the sum fixed by the commissioners is to be paid irrespective of the value of the benefice from year to year, that being an amount which may fluctuate very considerably from causes out of the control of the parties. The value of the benefice has been reduced not only by agricultural depression but also by the erection of the new district chapelry.

[DAY, J. That was done with the consent of the defendant, and cannot affect the amount of the pension payable to a previous incumbent.]

Asquith, for the plaintiff, was not called upon.

DAY, J. I have no doubt in this case, and, in my opinion, it is clear that the plaintiff is entitled to a pension of 400*l.* per annum. As the result of their inquiry, the commissioners specified that sum as the amount that ought to be allowed to the retiring incumbent, and in doing so they observed the provisions of s. 8 of the Act, by which the amount of the pension is limited to one-third of the annual value of the benefice. In assessing the pension at that amount they had regard to the annual value, and their decision was that a sum of 400*l.* a year was not in excess of one-third of that value. The obvious meaning of the proviso in the section is that there is to be a limitation on the discretion of the commissioners as to the amount to be awarded, which is not to exceed one-third of the annual value of the benefice at the time when their award is made. The declaration of the bishop was duly made, and by s. 9 it is provided that that document shall be the title deed of the retiring incumbent to the pension "assigned therein to him;" while s. 10 provides that the pension "so allowed" shall be a charge on the revenues of the benefice. In the present case the sum of 400*l.* a year was

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the pension assigned to the plaintiff in the bishop's declaration, and that is the amount of pension which under s. 10 is not only a charge, but is "recoverable at law or in equity from the incumbent of the benefice."

WILLS, J. I am of the same opinion. Whatever weight, if any, might be attached to an argument founded on the diminution of the annual value of the living owing to agricultural depression, it is impossible for the defendant to found an argument on the arrangement by which, with his own consent, both his own duties and his income were diminished by the foundation of the district chapelry.

Judgment for the plaintiff.

Solicitors for plaintiff: *Robinson, Preston, & Stow.*
Solicitors for defendant: *Park Nelson, Morgan & Gemmell.*

W. J. B.

May 27, 28.

[IN THE COURT OF APPEAL.]

THE HIGHWAY BOARD FOR THE DISTRICT OF LOUGHBOROUGH, LEICESTER, APPELLANTS; CURZON, RESPONDENT.

Highway—Summary Proceeding for non-repair—Highway District—Admission of Liability by Waywarden—Special Case under Summary Jurisdiction Act, 1879—*Right of Appeal from Judgment of Divisional Court*—5 & 6 *Wm.* 4, *c.* 50, *ss.* 94, 95—25 & 26 *Vict. c.* 61, *s.* 18—41 & 42 *Vict. c.* 77, *ss.* 3, 5, 7, 10—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

When proceedings are taken before justices, under s. 18 of the Act 25 & 26 Vict. c. 61, for the non-repair of a highway in a parish forming part of a highway district, a bonâ fide admission by the waywarden of the parish that the road is a highway which the parish is bound to repair, is binding on the highway board, and it is not competent for them, after such an admission, to deny these facts so as to oust the jurisdiction of the justices.

Judgment of Queen's Bench Division (16 Q. B. D. 565) affirmed.

An appeal lies to the Court of Appeal from the judgment of a Divisional Court upon a special case stated under s. 33 of the Summary Jurisdiction Act, 1879, in proceedings before justices for the non-repair of a highway, the judgment not being "a judgment in any criminal cause or matter" within s. 47 of the Judicature Act, 1873.

APPEAL from the decision of a Divisional Court (16 Q. B. D. 565), upon a special case under s. 33 of the Summary Jurisdiction

Act, 1879, by way of appeal against an order of two justices for Leicester, adjudging that a highway in the parish of Lockington, Leicester, was out of repair, and that the appellants, the highway board, were chargeable with the repair of it.

Summonses had been issued under s. 18 of the Act 25 & 26 Vict. c. 61, upon the information of N. C. Curzon, the respondent, against the appellants and against the waywarden of Lockington (a parish within the district of the board), alleging that a highway in Lockington was out of repair, and that the appellants, being liable to repair it, had neglected to do so.

Upon the hearing before the justices the waywarden admitted that the road was a highway for all purposes, and that the parish was liable to repair it. The justices heard evidence to satisfy themselves that the admissions made by the waywarden were made bonâ fide, and after viewing the road they made an order on the appellants for the repair of it.

The appellants disputed that the road was a highway, and denied the jurisdiction of the justices, and the principal question was whether, since the Act 41 & 42 Vict. c. 77, the admission by the waywarden that the road was a highway which the parish was liable to repair, was conclusive, or whether it was competent to the appellants, the highway board, notwithstanding his admission, to deny those facts, and so oust the jurisdiction of the justices.

The Divisional Court (Huddleston, B., and Wills, J.), held that the admission was binding on the appellants.

Jelf, Q.C., and *Sills*, for the appellants.

Shiress Will, Q.C., for the respondent. There is a preliminary objection to the hearing of this appeal; it relates to a "criminal cause or matter" within the meaning of the Judicature Act, 1873, s. 47: *Reg.* v. *Whitchurch* (1); *Attorney-General* v. *Bradlaugh*. (2) The liability created by the order is purely of a criminal nature; it is not like an assault, which creates a liability of both a civil and a criminal nature, and admits of both a civil and a criminal remedy. It may be admitted that the highway board could not be indicted for disobedience to the order of the justices; but the inhabitants of the parish would be liable.

(1) 7 Q. B. D. 534. (2) 14 Q. B. D. 667, at p. 693.

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Jelf, Q.C., and *Sills*, for the appellants, were not called upon to argue.

LORD HERSCHELL, L.C. I think that the order of the justices is not "a judgment in a criminal cause or matter;" disobedience to the order does not result in either fine or imprisonment. The only ground for holding that the order is made in a proceeding of a criminal nature is that, if the road remains out of repair, the inhabitants of the parish may be indicted; but that ground is insufficient, as the highway board itself could not be indicted.

LORD ESHER, M.R., and FRY, L.J., concurred.

Jelf, Q.C., and *Sills*, for the appellants. It is not disputed that up to the year 1878 the waywarden was the proper person to admit liability on behalf of his parish. But it is contended that s. 18 of the Highway Act, 1862, is impliedly repealed by s. 10 of the Highways and Locomotives (Amendment) Act, 1878. The two enactments are so inconsistent that they cannot stand together. Under the earlier Act the court of petty sessions was to have jurisdiction; under the later the court of quarter sessions. Under the Act of 1862 (25 & 26 Vict. c. 61), when each parish was a repairing unit or area, it was reasonable that the admission of the waywarden of a parish, that the parish was liable to repair, should be binding on that parish, because the result of the admission was only to throw the cost of repairing on the parish which he represented. Under the Act of 1878 the contributions of the parishes which constitute the district of the highway board go into a common fund, so that the admission of the waywarden, if it is binding on the board, will operate to throw the cost of repairing on the whole district. The waywarden is chosen by the parish which he represents; the other parishes of the district have no voice in his election, and it would be unreasonable that they should be bound by his admission.

The mode of procedure provided by s. 10 of the Act of 1878 is inconsistent with that which is prescribed by s. 18 of the Act of 1862, and at any rate it would be very inconvenient that there should be two concurrent modes of procedure before different tribunals. Sect. 18 is impliedly repealed by the Act of 1878.

It would be unjust that the inhabitants of the parish should be indicted for that which is the default of the highway board. Under the Act of 1862 each parish had to provide the funds for repairing its own highways.

Again, under the Act of 1878, the funds out of which the cost of repairs comes are the funds of the board, so that the issue whether the board are liable to repair a road, raises a question of property in which the board, as distinguished from the particular parish, are interested. That such a question should be decided by justices would be contrary to the ordinary common law rule that justices cannot decide a disputed question of title to property. In such a case their jurisdiction is ousted.

Shiress Will, Q.C., for the respondent, was not heard.

LORD HERSCHELL, L.C. I am of opinion that the judgment of the Divisional Court must be affirmed. The question is, whether it was competent to the justices to make the order which they made, and this depends on whether s. 18 of the Act of 1862 is still in force, or whether it has been repealed by implication, or made impossible of operation, by the Act of 1878. It is said that, although by the Act of 1862, a highway board was constituted, whose duty it was, under s. 17, to maintain in good repair the highways within their district, yet that the burden of repairing the highways in each parish still in fact rested on the parish which at common law was bound to repair them; that, though the repairs were effected by the board and the money expended by them, yet they had to raise from each parish the expenses of repairing the highways of that parish. It is said further that, under that state of the law, it was reasonable that the admission of the waywarden of a parish, who was the representative of the parish, that a road was a highway which the parish was bound to repair, should conclude the liability of the parish to repair it, because he had a peculiar knowledge of the locality, and would not be likely to admit a liability of his own parish which did not in fact exist. But the Act of 1878 it is argued has made a very material alteration, because, by s. 7 all the expenses incurred by any highway board in maintaining and keeping in repair the highways of each parish within their

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district, are to be deemed to have been incurred for the common benefit of the several parishes within their district, and to be charged on the district fund. It is truly said that the effect of that Act is to take away from each parish its liability for the expenses of repairing its own highways, and to cast the burden of repairing them on all the parishes of the district in common, each parish contributing to the common fund out of which all the highways in the district are repaired. It is urged that the way-warden of the parish now stands in a different position from that in which he formerly stood, for, whereas formerly his admission affected the liability of his own parish exclusively, now his admission would cast a burden more or less on all the parishes of the district. That is perfectly true, and it is, no doubt, a matter well deserving the attention of the legislature. But, if the legislature have left the old mode of procedure under s. 18 still subsisting, we can do nothing but permit the law to take its course. Now s. 18 is not in terms repealed by the Act of 1878, though other provisions of the Act of 1862 have been expressly repealed by the Act of 1878. If s. 18 has not been expressly repealed, it can only have been repealed by implication, and, however inconvenient or unreasonable we may think it that it should continue in operation, it would be impossible to hold that it has been impliedly repealed, unless we can find something in the later Act which cannot stand with it. The mere fact that the provisions of the later Act make it very inconvenient or unreasonable that s. 18 of the former Act should remain in operation is not a sufficient reason for holding that it has been repealed. Is there, then, anything which makes it impossible that the two should stand together? I am unable to see that there is, though I am fully sensible of the force of the arguments of Mr. Jelf and Mr. Sills. I can see nothing which makes it impossible to work s. 18 of the earlier Act, or to pursue all its provisions. The result, no doubt, is that there may be two concurrent proceedings before different tribunals, but that is not sufficient to shew that the legislature have impliedly repealed the earlier section. It is argued that it has become impossible to work s. 18, because the parish is no longer liable to repair its own highways. I do not think that the common law as to the liability of a parish to repair its own highways has

been changed. The true effect of s. 7 of the Act of 1878 is, I think, that each of the parishes in the district remains liable for the repair of its own highways, and it is by reason of that liability that the parish is obliged to contribute to the common fund. Sect. 7 only provides a new mode by which the liability of each parish is to be discharged. Instead of there being a separate fund and separate accounts for each parish, each of the parishes contributes to a common fund, which is to be expended in repairing all the highways within the district. It seems to me that the draftsman of the Act of 1878 had not present to his mind the exact state of the law at the time when that Act was introduced, and I am fully alive to the inconveniences which may arise. But we should be going far beyond our functions as judges, if we were to attempt to set those inconveniences right. The remedy must be found in an application to the legislature, not to this Court.

LORD ESHER, M.R. There are certain simple rules as to the construction of statutes upon which the Courts have acted for hundreds of years, and we must follow these recognised rules. It is admitted that, unless s. 18 of the Act of 1862 has been repealed by the Act of 1878, the application was properly made, and that everything has been done in strict accordance with the provisions of s. 18. It must be shewn, therefore, that s. 18 has been repealed, or that some part of it has been repealed. It has not, nor has any part of it, been in terms repealed, and, according to the recognised rule of construction, it cannot be held to have been repealed by implication, unless the steps which are to be taken under the Act of 1878 are wholly inconsistent with the provisions of s. 18. The argument has been, not that the provisions of the two Acts are inconsistent, but that something unreasonable and unjust would result from applying the provisions of s. 18 to the existing state of the law. If that were so, it would not be a ground for holding that s. 18 has been repealed. But I doubt whether any of the points which have been taken are tenable. It is said that the parish is no longer liable to repair its highways, and the person who makes the admission of liability will be throwing a burden on other parishes which he

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does not represent. I do not agree that the parish is no longer liable. It is liable to the public, who are entitled to have the public highways kept in proper order, and members of the public are entitled to look to the parish to do this. There is nothing to shew that the parish is not still liable to indictment for the non-repair of the highways in the parish. Is there anything to shew that the parish is not liable to pay the expense of the repairs? It is still liable, though in a different way; it is liable to contribute to the common fund of the district. The parish in which the road is situate has in the result to pay for the repair of that particular road, though it has not to pay the whole of the expense at that time. What is the procedure? The parish which is liable to repair its own highways is to elect its own waywarden. Under the Act of 1878 he has no interest in the repair of the roads, but a public duty is imposed on him from which he cannot derive any personal benefit. What is there unreasonable in the legislature trusting him to perform this public duty fairly? In the present case the justices have inquired into the bona fides of the waywarden, and have found that he made the admission bonâ fide. The legislature have taken every precaution by appointing a disinterested person who has special knowledge to perform this public duty. If he is likely to perform the duty bonâ fide why should not the legislature trust him? He is the man who is most likely to know whether a road is a highway which his own parish is liable to repair. If he makes an admission wrongly his own parish will have to pay for his mistake, and their remedy will be not to elect him again at the next election. I can see nothing unreasonable in the provisions of s. 18 as applied to the existing state of the law, and, even if I could, it would not alter my opinion that s. 18 has not been repealed by implication.

FRY, L.J. I am entirely of the same opinion. The short question is, whether s. 18 of the Act of 1862 has been repealed by implication by the Act of 1878. The repeal of a statute by implication is not an easy thing to establish; it can only be done when the provisions of the earlier statute are plainly inconsistent with those of the later.

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Fry, L.J.

After the Act of 1862 was passed there were two modes of procedure for enforcing the repair of a highway, one at common law by indictment, and the other under s. 18 of the Act. Sect. 10 of the Act of 1878 has provided another and a new mode of procedure. But it is plain that, when the legislature give a new remedy for an existing right, the old remedy is not taken away, unless the legislature have expressly said so, or unless the new remedy is inconsistent with the old one. All that can be said in the present case is, that the new remedy would be concurrent with the old one, and that this would be inconvenient; it is impossible on this ground to say that there is any inconsistency between the two. The appeal must, therefore, fail.

Appeal dismissed.

Solicitors for appellants: *Field, Roscoe & Co., for Deane & Hands, Loughborough.*

Solicitors for respondents: *Crowders & Vizard, for Owston, Dickinson & Simpson, Leicester.*

W. L. C.

[IN THE COURT OF APPEAL.]

June 5.

IN RE McHENRY.

Bankruptcy—Appeal—Security for Costs—Increasing Amount of Deposit—"Special Circumstances"—Bankruptcy Rules, 1870, *r.* 145—*Bankruptcy Rules*, 1883, *r.* 113—*Rules of Supreme Court*, 1883, *Order LVIII., r.* 15.

The deposit paid by a bankrupt on entering a bankruptcy appeal was ordered to be increased, on the ground that he had been already engaged in protracted and uniformly unsuccessful litigation with the respondents respecting the matters in question.

ORIGINAL motions, asking that the deposit paid by a bankrupt upon entering an appeal from an order of Mr. Registrar Hazlitt might be increased.

On the 2nd of June, 1886, a motion was made by the bankrupt before the registrar, asking that the registrar's decision, sitting as chairman of the first meeting of the creditors, whereby he admitted a proof tendered by the New York, Lake Erie, and Western Railroad Company; a proof tendered by H. L. Bischoffsheim; and a proof tendered by the Credit Company, might be

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rescinded or varied, and a new first meeting might be directed to be summoned. The application was opposed by counsel on behalf of each of the creditors named, and also by counsel on behalf of the trustees of the property and effects of the bankrupt, who had been appointed in the bankruptcy. The registrar dismissed the motion, and ordered that the bankrupt should pay the costs of the respondents respectively of and occasioned by the application.

The bankrupt gave notice of appeal, and on entering the appeal he paid the ordinary deposit of 20*l.*, as required by rule 145 of the Bankruptcy Rules, 1870, and rule 113 of the Bankruptcy Rules, 1883.

Each of the three creditors and the trustees gave a separate notice of motion for an increase of the deposit.

The adjudication of bankruptcy had been made in the course of liquidation proceedings instituted by the bankrupt in 1879 under the Bankruptcy Act, 1869, under the power given to the Court by s. 126 of that Act. The bankrupt had been engaged in protracted litigation with the three creditors as to the debts due from him to them respectively, and had been uniformly unsuccessful.

Pollard, for Bischoffsheim. A single deposit of 20*l.* is not sufficient. Each of the respondents has a different case, and the registrar allowed each of them separate costs. If this case is governed by the rules of 1870, the Court has power to order the deposit to be increased: *Ex parte Isaacs* (1); and, if the rules of 1883 apply, rule 113 gives an express power to increase the deposit. At any rate, under rule 15 of the Rules of the Supreme Court, 1883, the Court has power under special circumstances to require security to be given for the costs of any appeal. The fact that the appellant is a bankrupt, and that he has no estate, is a "special circumstance" within rule 15.

Sidney Woolf, for the Erie Company.

Dauney, for the Credit Company. The protracted litigation in which the bankrupt has been engaged with the respondents without success is a "special circumstance" within the rule.

(1) 9 Ch. D. 271.

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Winslow, Q.C., for the trustees.

Cooper Willis, Q.C., and *Herbert Reed*, for the bankrupt. The same principle of law applies to the cases of all the four respondents. There are no special circumstances. The questions which have been decided in the previous litigation will not be raised again.

LORD ESHER, M.R. Without deciding whether the mere fact of bankruptcy would be a "special circumstance" in a case in which the bankrupt himself is the appellant, I think that there are other "special circumstances" in the present case which justify us in requiring further security to be given for the costs of this appeal—I mean the protracted litigation—always unsuccessful and always troublesome and expensive—in which the bankrupt has been engaged with the respondents. He must deposit 100*l.* in court in addition to the 20*l.* which he has already paid. We reserve the question how the deposit is to be apportioned among the respondents.

BOWEN, L.J., and FRY, L.J., concurred.

Solicitors for applicants: *Freshfields & Williams; Munns & Longden; Edwin Andrew.*

Solicitors for bankrupt: *G. S. & H. Brandon.*

W. L. C.

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June 11.

[IN THE COURT OF APPEAL.]

HOULDER BROTHERS & CO. *v.* THE MERCHANTS MARINE INSURANCE COMPANY, LIMITED.

Insurance (Marine)—Risk of Craft till Goods landed—Transhipment from Lighters into export Vessel.

A policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely landed" does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel.

THIS was an action brought on a policy of marine insurance subscribed by the defendants on rails shipped on board the steamship *Kirkstall*, "at and from Hull to London, including all risk of craft, until the goods are discharged and safely landed."

The case was tried before Field, J., without a jury, when it appeared that the rails arrived in London, and were discharged into lighters with the intention not of landing them, but of loading them into other ships for exportation to Sydney. Before they were so loaded a gale sunk some of the lighters.

This action was brought for salvage and average expenses. The trial resulted in a verdict for the defendants. The plaintiffs appealed.

May 11. *Reid, Q.C.*, and *Hollams*, for the plaintiffs. It was shewn at the trial that almost all rails sent coastwise to London are reshipped for export without being landed. Consequently the terminus ad quem which the parties contemplated was the export ship. There cannot be said to have been any deviation, for there was nothing unreasonable in the delay, and no time was lost: *Samuel* v. *Royal Exchange Assurance Co.* (1), *Pearson* v. *Commercial Union Assurance Co.* (2)

Cohen, Q.C., and *J. Gorell Barnes*, for the defendants. The word "landed" must be taken in its ordinary and natural meaning unless there is some custom which controls the interpretation. No such custom was proved. When the goods were put into the lighters to be carried to the export ship instead of being landed

(1) 8 B. & C. 119. (2) 1 App. Cas. 498.

there was an abandonment of the voyage and a commencement of the new voyage. A loss occurring after this would be covered by a policy, which included risk of craft, from London to the port of destination, and was not within the terms of the present policy.

R. T. Reid, Q.C., in reply.

Cur. adv. vult.

June 11. The judgment of the Court (Lord Esher, M.R., and Bowen and Fry, L.JJ.) was read by

BOWEN, L.J. This is an action by the shipper of a cargo of iron rails against the underwriters of a policy on the goods from Hull to London, including all risk of craft. The ship arrived safely in the port of London, but the rails instead of being landed were placed in lighters for transhipment in dock to an export vessel, and during the process of transhipment in the dock, which process was lengthened by reason of the export ship not being ready to receive the rails, a portion were lost by the swamping of the lighters. Mr. Justice Field held that the underwriters were discharged, because the accident happened after the expiration of a reasonable and ordinary period from the time at which the goods had been placed on the lighters for transhipment. Against this judgment the plaintiffs have appealed.

The question whether a reasonable time had elapsed after the discharge into lighters for transhipment does not arise in its simple sense if the risks covered by the policy did not include the risk of waiting in lighters for transhipment into an export vessel, and our opinion is that such was in fact the case, and that these goods, though lost upon the lighters, were not lost by any of the perils during the continuance of any of the risks covered by the policy.

The policy in question includes all risk of craft until the said goods or merchandise be discharged and "safely landed." The risk insured against is the risk of the transit upon the lighters which have in the ordinary course of business to convey the goods to the shore. The nature of this risk can be perfectly appreciated and estimated by the parties to the contract. Landing goods means putting them upon the land, or upon that which by

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custom of the port is its equivalent. In the present case, instead of placing the goods on lighters to carry them to the shore, the goods were placed upon lighters which were to take them to an export vessel and there to load them as soon as she was ready to receive them. Such transhipment, however usual in the trade, is not the same thing as landing the goods directly and immediately upon the quay. A lighter which has to land its cargo has only to make for the quay and to wait its turn in accordance with the usages of the port. A lighter which is intended to tranship the goods to another ship may have to wait for its arrival and till it is ready to take the cargo, and may thus be subject to additional risks of exposure to the weather and of collision with other vessels or barges in the dock. In the smaller London docks lighters may be comparatively safe, but in the larger docks they are often swamped by the wind and by the waters: and yet might be obliged to wait days or possibly weeks for the arrival of the export vessel to which the goods were consigned. Cargo discharged upon lighters for transhipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once. It is perfectly true that by taking delivery short of the shore the consignee determines the risk insured. But this is not because in such a case the risk is terminated by an actual landing, but because the consignee waives the landing and himself terminates the risk instead by taking delivery short of the land. Nobody, in commercial or business language, can say that goods are landed which are transhipped without landing, or that goods which are placed in lighters for transhipment are placed in lighters to be landed. It was no doubt proved conclusively at the trial that steel rails which are consigned by coasting vessels to London are most commonly transhipped into export vessels at London without being landed, and underwriters no doubt must be taken to be familiar with the ordinary incidents of the trade and of the transit of the goods insured. But this falls short of proving that by any custom transhipment is equivalent to landing.

We were told that it is unusual in such cases to make the policy in any other form than that in which it was made. If

this be true, it only follows that it is usual in these cases not to insure the risk which has really to be run. Policies which provide for transhipment are perfectly familiar to all commercial lawyers, and if those who consign steel rails to London are in the habit of transacting their business by means of policies which do not contain the appropriate and proper clause, the shippers, if a loss happens outside of the risk against which they are insured, must take the consequences of not having protected themselves by the proper contract of insurance. The goods here have been lost, but by an accident not covered by the policy; and on this ground we can only come to the conclusion that the plaintiffs' appeal fails, and that the action must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Waltons, Bubb, & Johnson.*

A. M.

[IN THE COURT OF APPEAL.]

May 21.

EX PARTE GRIMWADE. IN RE TENNENT.

Bankruptcy — Bankruptcy Notice — "Final Judgment" — "Balance Order" against Contributory in Winding-up of a Company — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A "balance order" in respect of calls made on a contributory in the winding-up of a company is not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued in respect of such an order.

Ex parte Whinney (13 Q. B. D. 476) followed.

APPEAL from an order made by Mr. Registrar Finlay Knight, setting aside a bankruptcy notice which had been issued by W. L. Grimwade against R. B. Tennent.

Grimwade was the official liquidator of a company called Webb & Co., Limited, in which Tennent was a shareholder, and which was being wound up under the Companies Acts in the Chancery Division. Tennent had been settled on the list of contributories, and a "balance order" for 272*l.* 10*s.* had been made against him. The bankruptcy notice required Tennent to

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pay to Grimwade, the official liquidator of Webb & Co., "the sum of 272*l.* 10*s.*, claimed by him as such official liquidator as aforesaid, as being the amount due on a final judgment obtained by him against you in the Chambers of Mr. Justice Pearson, in the Chancery Division of the High Court of Justice, in the proceedings to wind up the aforesaid company, and dated the 28th of March, 1885, in respect of the call of 2*l.* per share, made by an order in the said proceedings dated the 8th of July, 1884, on the 126 shares for which you were settled on the list of contributories of the said company as a member of the said company in your own right, with interest thereon at the rate of 5 per cent. per annum from the 26th of July, 1884, to the date hereof, whereon execution has not been stayed."

The registrar set aside the notice, on the ground that Tennent had a counter-claim or set-off for a larger amount against the company.

Grimwade appealed.

Herbert Reed, for the appellant. An objection to the bankruptcy notice will be taken by the respondent, which was not taken before the registrar, viz., that the order, which is described in the notice as a "final judgment," is a "balance order" upon a contributory in the winding-up of a company, and that such an order is not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. In *Ex parte Whinney* (1) a Divisional Court held that such an order is not a "final judgment." It is submitted that that decision was wrong. The order is as final in its nature against the contributory as any order can be, and it can be enforced in the same way as a judgment. In *Ex parte Moore* (2), an order for the payment of costs was held to be a "final judgment." If the appeal is dismissed, it should be dismissed without costs, because this objection was not taken before the registrar.

F. Cooper Willis, for the debtor, was not heard.

LORD ESHER, M.R. I think the registrar ought to have seen from the order itself that it was not a "final judgment," though

(1) 13 Q. B. D. 476. (2) 14 Q. B. D. 627.

it is so described in the bankruptcy notice. I adhere to the rule which I have often stated, that, when an objection is patent on the face of an order or document which is brought before a judge, he is bound to see the objection, even though it is not taken by counsel. The appeal will be dismissed with costs.

BOWEN and FRY, L.JJ., concurred.

Solicitors for appellant: *Beall & Co.*
Solicitor for debtor: *William Sweetland.*

W. L. C.

[CROWN CASE RESERVED.]

May 15.

THE QUEEN *v.* LATIMER.

Criminal Law—Unlawful and malicious wounding—Malice—24 & 25 Vict. c. 100, s. 20—Blow aimed at one Person accidentally wounding another.

The prisoner, in striking at a man, struck and wounded a woman beside him. At the trial of an indictment against the prisoner under 24 & 25 Vict. c. 100, s. 20, for unlawfully and maliciously wounding her the jury found that the blow was unlawful and malicious and did in fact wound her, but that the striking of her was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected. The prisoner was convicted:—

Held (distinguishing *Reg.* v. *Pembliton*, Law Rep. 2 C. C. 119), that the conviction was right.

CASE stated by the recorder of Devonport.

The prisoner was indicted and tried for unlawfully and maliciously wounding Ellen Rolston, and there was a second count charging him with a common assault. The evidence shewed that the prisoner, who was a soldier, and one Thomas Evan Chapple quarrelled in a public-house kept by the prosecutrix, and the prisoner was knocked down by Chapple. The prisoner went out into a yard at the back of the house, but about five minutes afterwards returned and passed hastily through the room in which Chapple was still sitting. The prisoner as he passed, having in his hand his belt, which he had taken off, aimed a blow with his belt at Chapple and struck him slightly, the belt, however, bounded off and struck the prosecutrix, who was standing

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talking to Chapple, in the face, cutting her face open and wounding her severely.

The recorder left these questions to the jury:—

1. Was the blow struck at Chapple in self-defence to get through the room, or unlawfully and maliciously? 2. Did the blow so struck in fact wound Ellen Rolston? 3. Was the striking of Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: 1. That the blow was unlawful and malicious. 2. That the blow did in fact wound Ellen Rolston. 3. That the striking of Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the recorder directed a verdict of guilty to be entered on the first count.

The question was, whether upon the facts and findings of the jury the prisoner was rightly convicted of the offence for which he was indicted?

H. H. S. Croft, for the prisoner. On the findings of the jury the prisoner cannot be convicted. In *Reg.* v. *Pembliton* (1) the prisoner throwing a stone at some persons in the street broke a window, the jury found he did not intend to break it, and the Court held that this finding negatived the existence of malice either actual or constructive, and that he could not be convicted on an indictment under 24 & 25 Vict. c. 97, s. 51, for "unlawfully and maliciously" causing the damage to the window. Blackburn, J., said (2), "It is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do." The prisoner did not intend to strike the prosecutrix, and the jury have found that the injury was purely accidental. Therefore there was no mens rea, and the wounding was not malicious.

[FIELD, J. In *Rex* v. *Hunt* (3) the prisoner stabbing at one man cut and wounded another, and on an indictment for feloniously cutting him the Court held that general malice was sufficient under the statute without particular malice towards the person cut.]

(1) Law Rep. 2 C. C. 119. (2) At p. 122. (3) 1 Moo. C. C. 93.

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Reg. v. *Hewlett* (1) is inconsistent with that case.

[LORD ESHER, M.R. The indictment in *Reg.* v. *Hewlett* (1) was for wounding with intent.]

Melsheimer, for the prosecution, was not called on.

LORD COLERIDGE, C.J. We are of opinion that this conviction must be sustained. It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges call general malice, and that is enough. Such would be the case if the matter were res integra; but it is not so, for *Rex* v. *Hunt* (2) is an express authority on the point. There a man intended to injure A., and said so, and, in the course of doing it, stabbed the wrong man, and had clearly malice in fact, but no intention of injuring the man who was stabbed. He intended to do an unlawful act, and in course of doing it the consequence was that somebody was injured. But the words of the statute under which the prisoner is indicted carry the case against him further still; because 24 & 25 Vict. c. 100, s. 18, enacts that "whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person" with malicious intent, shall be guilty of felony; then s. 20 leaves out the intent, and says, "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person . . . shall be guilty of a misdemeanour." The language of s. 18 and of s. 20 is different, and the present conviction is under s. 20 and not under s. 18.

The Master of the Rolls has pointed out to me that these sections are in substitution for and in correction of the earlier statutes, in which the unlawful act must be done with intent to injure "such person," making it necessary that the intent should be against the person injured, whereas in 24 & 25 Vict. c. 100, the words "such person" are left out, for s. 18 says, "any person," and s. 20 "any other person." So, but for *Reg.* v. *Pembliton* (3), there would not have been the slightest difficulty.

(1) 1 F. & F. 91.

(2) 1 Moo. C. C. 93.

(3) Law Rep. 2 C. C. 119.

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Does that case make any difference? I think not, and, on consideration, that it was quite rightly decided. But it is clearly distinguishable, because the indictment in *Reg.* v. *Pembliton* (1) was on the Act making unlawful and malicious injury to property a statutory offence punishable in a certain way, and the jury expressly negatived, and the facts expressly negatived, any intention to do injury to property, and the Court held that under the Act making it an offence to injure any property there must be an intent to injure property. *Reg.* v. *Pembliton* (1), therefore, does not govern the present case, and on no other ground is there anything to be said for the prisoner.

LORD ESHER, M.R. I am of the same opinion. The only case which could be cited against the well-known principle of law applicable to this case was *Reg.* v. *Pembliton* (1), but, on examination, it is found to have been decided on this ground, viz., that there was no intention to injure any property at all. It was not a case of attempting to injure one man's property and injuring another's, which would have been wholly different.

BOWEN, L.J. I am of the same opinion. It is quite clear that the act was done by the prisoner with malice in his mind. I use the word "malice" in the common law sense of the term, viz., a person is deemed malicious when he does an act which he knows will injure either the person or property of another. The only case that could be cited for the prisoner is *Reg.* v. *Pembliton* (1), which was founded—not upon malice in general—but upon a particular form of malice, viz., malicious injury to property; and the Court held that though the prisoner might have been acting maliciously in the common law sense of the term, he was not malicious in the sense of the Act directed against malicious injury to property. That decision does not apply to a case under the Act where the indictment is for injury to the person. *Reg.* v. *Pembliton* (1) might have been ground for an argument of some plausibility if the prisoner meant to strike at a pane of glass and had hit a person. It might have been that

(1) Law Rep. 2 C. C. 119.

the malice in that case was not enough. But when, as here, an intent to injure a person is proved, that is enough.

FIELD, J. I also am of opinion that this conviction must be affirmed. The reasons of my judgment have been so fully stated, and the distinction between *Reg.* v. *Pembliton* (1) and this case has been so clearly shewn, that I will only say that this is a very important case of wide application, and I am glad that it has received the authoritative decision of this Court.

MANISTY, J. I will add only a few words, for all has been said that could be said, but the facts of this case, no doubt, raise an exceedingly important question, for the man Chapple, whom the prisoner intended to strike, and who was struck, with the belt, was standing close by the woman, and the belt bounded off and struck the prosecutrix. It seems to me that the first and second findings of the jury are quite sufficient to justify the verdict, for they find that the blow was unlawful and malicious, and that it wounded the prosecutrix. That being so, the third finding does not entitle the prisoner to acquittal. The third finding is that the striking of the prosecutrix was purely an accident, and so it was in one sense. The prisoner did not intend to strike her, but in the unlawful and malicious act of striking Chapple the prisoner did unlawfully and maliciously wound the prosecutrix, and the third finding is quite immaterial.

Conviction affirmed.

Solicitor for prosecution: *H. Windybank.*
Solicitor for prisoner: *J. Gilbard.*

(1) Law Rep. 2 C. C. 119.

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April 20.

THE GUARDIANS OF SHEPPEY UNION *v.* THE OVERSEERS OF THE POOR OF ELMLEY.

Highway—Expenses of—Highway District—Rural Sanitary District—Coincident in Area—Subtraction of Parish—Contribution from—25 & 26 *Vict. c.* 61, *s.* 39; 41 & 42 *Vict. c.* 77, *ss.* 3, 4, 7.

The provisions in 25 & 26 Vict. c. 61, s. 39, for altering a highway district by subtracting from it any parish by order of the county authority are not repealed by 41 & 42 Vict. c. 77, s. 3, providing for the formation of highway districts coincident in area with rural sanitary districts, and, by s. 4, for the exercise by the rural sanitary authority of the powers of a highway board within their district, and for the dissolution of the existing highway board. Therefore, although by an order made under 41 & 42 Vict. c. 77 the area of a highway district may have become coincident with the area of a rural sanitary district, and the rural sanitary authority have been duly authorized to exercise the powers of a highway board, they cannot enforce contribution to the expenses of the board from a parish which has been duly subtracted from the district by an order under 25 & 26 Vict. c. 61, s. 39.

Case stated by justices of Kent under 20 & 21 Vict. c. 43.

An application under 2 & 3 Vict. c. 84, s. 1, was made to the justices in petty sessions on the complaint of the chairman of the rural sanitary authority of the Sheppey Union that the rural sanitary authority made their order of the 8th of April, and thereby ordered and directed the overseers of the poor of the parish of Elmley, being one of the parishes comprised in the district of the rural sanitary authority, to pay 100*l.* from the poor-rates of the parish as the contribution of the parish to the general expenses incurred, or to be incurred, by the rural sanitary authority; that a copy of the order was duly served, and that the overseers had neglected to pay the contribution; whereupon the justices issued their summons to the overseers to shew cause why a warrant should not issue to levy the amount.

The following facts were admitted:—

The parish of Elmley was, previous to April, 1884, one of the parishes forming part of the district of the Sheppey Highway Board, constituted by order of justices in general sessions under the Highway Act, 1862, and was also one of the parishes forming the rural sanitary district of the Sheppey poor law union, which district was coincident in area with the highway district.

At the April quarter sessions, 1884, the ratepayers of Elmley applied for a provisional order under 25 & 26 Vict. c. 61, ss. 5 and 39, and 27 & 28 Vict. c. 101, s. 5, taking the parish of Elmley out of the district of the highway board, and the court made the order provisionally, and at the following quarter sessions held on the 1st of July made two orders. By the first, after reciting that the rural sanitary authority of the Sheppey rural sanitary district had stated to the court that they were desirous of exercising the powers of a highway board within their district, and had applied to the court for an order to give them such powers pursuant to the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77); and that proof had then been given to the court that the area of the highway district was and had become coincident with the area of the sanitary district,—it was ordered and declared that from and after the 1st of July, 1884, the rural sanitary authority should exercise all the powers of a highway board within the rural sanitary district as provided and limited in the said statute.

By the second, after reciting the provisional order, and the formalities connected therewith, it was ordered that the provisional order be and the same was thereby confirmed, so far as the same ordered that the parish of Elmley be removed and excluded from the Sheppey highway district, but that the order be not confirmed so far as it related to constituting the parish a highway district by itself or to the election of a waywarden.

The rural sanitary authority considered the first order of the 1st of July, 1884, to constitute them the highway authority for the whole area of their sanitary district; and the second order, separating Elmley, to be ultrà vires and void, and proceeded to make a precept upon the overseers of Elmley for payment of 100*l.*, being the balance due upon the late highway board's account and a contribution to them as the sanitary authority.

This precept was served, and the overseers of Elmley paid to the treasurer of the rural sanitary authority 60*l.* on account, leaving a balance of 40*l.* unpaid on such precept.

The justices refused to grant a warrant, and dismissed the case, considering that the order of the 1st of July, 1884, by the terms of which the parish of Elmley was no longer within the highway

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area over which the appellants exercised the powers of a highway board, not having been appealed against or reversed by a competent Court was binding upon the justices, and they were not entitled to inquire into the question of whether or not the court of quarter sessions was right in making it.

The question was whether the order of sessions of the 1st of July, 1884, confirming the provisional order of the 8th of April, 1884, was a good and subsisting order binding upon the parties.

Dickens, for the appellants. The order subtracting the parish of Elmley from the highway district was ultrà vires, and the rural sanitary authority, being duly constituted the highway board for that district, have power to enforce contribution from all the parishes within it, including the parish of Elmley. Otherwise there would be no power to levy rates within that parish for the expenses of the highways, because after the order made under 41 & 42 Vict. c. 77, s. 3, whereby the highway district coincident in area with the rural sanitary district was formed, and the order that the rural sanitary authority should exercise all the powers of a highway board, the existing highway board for the district became dissolved, and the waywardens or surveyors ceased to hold office for the parish: s. 4. The whole scope of this Act is to repeal the provisions of the 25 & 26 Vict. c. 61, s. 39, for altering a highway district by the addition or subtraction of a parish, and s. 7 of the 41 & 42 Vict. c. 77, providing that if the highway board think it just they may divide their district into parts, and charge exclusively on each part the expenses of the highways in each respectively, prevents any hardship or inconvenience arising from such repeal.

R. H. Deane, for the respondents. The order removing the parish of Elmley from the Sheppey highway district was valid, and the justices were right. Before the Highways and Locomotives Act, 1878, there were two authorities with jurisdiction. One was the rural sanitary authority, the other was the highway authority. The object of the Highways Act, 1878, was to vest the powers in one only, and therefore s. 3 enacts that the county authority, which "means the justices in quarter sessions," shall so far as may be found practicable make the highway district

and the sanitary district coincident, and afterwards, by s. 4, may make an order declaring that the sanitary authority shall exercise the powers of a highway board, and the existing board is dissolved. But s. 39 of the 25 & 26 Vict. c. 61, was passed for a different purpose, viz., that where there was injustice to a parish from the incidence of rates, the justices might, by an order, take it out of the highway district.

By the first order of the 1st of July, 1884, the Sheppey rural sanitary authority shall exercise all the powers of a highway board within their district. By a subsequent order, the parish of Elmley is removed and excluded from the Sheppey highway district. That order was duly made under 25 & 26 Vict. c. 61, s. 39, which has not been repealed. By 41 & 42 Vict. c. 77, s. 4, the county authority has power still to rescind or vary such order, and therefore no injustice will arise.

Dickens, replied.

DENMAN, J. I am of opinion that the respondents are entitled to judgment. The whole question is whether when a parish has once been included in a district coterminous with the area of jurisdiction of the sanitary authority, the power which existed before the Highway Act of 1878, of (by an order) taking out any single parish, has, since that Act, gone, and whether under the later Act providing for it in another way, the power in the previous Act must not be taken to be impliedly repealed. The case turns on two sections. First, s. 39 of 25 & 26 Vict. c. 61, providing that any highway district may be altered by the addition of any parishes in the same or in any adjoining county, or the subtraction therefrom of any parishes, &c., but any such alteration shall be made by provisional and final orders of the justices.

Then by 41 & 42 Vict. c. 77, s. 3: "In forming any highway districts, or in altering the boundaries of any highway districts, the county authority shall have regard to the boundaries of the rural sanitary districts in their county, and shall, so far as may be found practicable, form highway districts so as to be coincident in area with rural sanitary districts, or wholly contained within rural sanitary districts." Here there has been a highway district

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formed coincident in area with a rural sanitary district. So far all is regular. Then the question arises, whether, when that is once done, the power to exempt a parish from such a district is wholly gone? By s. 4: "where a highway district, whether formed before or after the passing of this Act, is or becomes coincident in area with a rural sanitary district, the rural sanitary authority of such district may apply to the county authority, stating that they are desirous to exercise the powers of a highway board under the Highway Acts within their district." There has been such an application, it has been granted, and there is no doubt that, subject to any further question, the highway district and the sanitary district have become coterminous, and the rural authority have become the highway authority within that district. "On such application the county authority may, if they see fit, by order declare that from and after a day to be named in the order (in this Act called the commencement of the order) such rural sanitary authority shall exercise all the powers of a highway board under the Highway Acts; and as and from the commencement of the order the existing highway board (if any) for the district shall be dissolved, and waywardens or surveyors shall not hold office or be elected for any parish in the district." Those words are general, and, but for the words which follow, I should say they were quite inconsistent with the continuance of the powers under the previous Act, but the section goes on: "An order made under this section may be amended, altered, or rescinded by a subsequent order of the county authority," and when I look back again to s. 39 of the Act of 1862, to see what was contemplated as regards alteration, I find the words are that any highway district "may from time be time be altered" as to the parishes. Those words are perfectly general in that section, and it is not repealed by the Act of 1878 or any subsequent Act. It was argued that the whole scope of the later Act is to do away with such power, and if there had been affirmative words in the later Act inconsistent with the continuance of the power under the former Act, the argument might have prevailed. But the strongest provision relied on was s. 7, which to a certain extent operates in correction or alleviation of any injustice to arise in any particular parish from still continuing to

be in a certain district, independent of any such alleviation as might result from exempting it from the area and leaving it out of the district altogether for any such purposes. But I cannot find that that section in any way refers to the former, or conflicts with it so as to necessarily repeal it. The ordinary rule cannot be better put than in Maxwell on Statutes (2nd ed.), p. 198: "It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers escape from it is more likely to be in consonance with the real intention." It is the doctrine of jurists of all countries and times that "an author must be deemed consistent with himself," and for the word "author" I read "legislature." If the legislature intended the creation of coterminous districts (a rural sanitary district once coterminous with the highway district) which should never be changed by the exemption of a particular parish, it would have been very easy to say so. For these reasons I think we ought to hold that the power given by s. 39 of 25 & 26 Vict. c. 61, still remains, that there was the power to subtract a parish from the highway district, that there is still such power notwithstanding the district may have become coterminous with the rural sanitary district, and that there is nothing in the later Act sufficient to induce us to hold so plain a discretion has been repealed, although the draftsman may have had it in his mind that the previous section would be abrogated as he was drafting the subsequent Act. I think the justices had jurisdiction to make the order.

HAWKINS, J. I am of the same opinion.

By 25 & 26 Vict. c. 61, provision was made for the formation of highway districts, and in s. 39 for the alteration of them, and the latter part of s. 39 enacts that "Where any highway district is dissolved, or where any parish is excluded from any highway district, the highways in such district or parish shall be maintained, and the provisions of the principal Act in relation to the election of surveyors and to all other matters shall apply to the

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said highways, in the same manner as if such highways had never been included within the limits of a highway district." That gave power to subtract parishes from any highway district which was formed under that Act of 1862. 41 & 42 Vict. c. 77, then was passed (so far as regards the section now under discussion) for the purpose of placing in the rural sanitary authority the power of the highway board, and no doubt it was thought desirable by the legislature that the two districts should be coterminous, for s. 3 enacts that "in forming any highway districts," that is such districts as the justices were authorized to form under the first Act, "or in altering the boundaries of any highway districts, the county authority," which means the justices at quarter sessions, "shall have regard to the boundaries of the rural sanitary districts in their county, and shall, so far as may be found practicable, form highway districts so as to be coincident in area with rural sanitary districts, or wholly contained within rural sanitary districts." I cannot read that without coming to the conclusion that it was not absolutely imperative and obligatory on the justices in forming highway districts to make them coterminous in every respect with the sanitary district; but it only meant that the justices should do their best, and as far as practicable make the boundaries of the highway district coterminous with the rural district, and make the highway district at all events wholly contained within the rural sanitary district. Sect. 4 proceeds: "Where a highway district . . . . is or becomes coincident in area with a rural sanitary district, the rural sanitary authority of such district may apply to the county authority, stating that they are desirous to exercise the powers of a highway board under the Highway Acts within their district," i.e., a power is given to the sanitary authority to apply in those particular cases, viz. where the area of the two districts becomes coterminous. "On such application the county authority may, if they see fit, by order declare that . . . . such rural authority shall exercise all the powers of a highway board under the Highway Acts; and as and from the commencement of the order the existing highway board (if any) for the district shall be dissolved, and waywardens or surveyors shall not hold office or be elected for any parish in the district. An order

made under this section may be amended, altered, or rescinded, by a subsequent order of the county authority." Sect. 5 is immaterial until the last clause of sub-s. 1: "All property by this Act transferred to the rural sanitary authority shall be held by them on trust for the several parishes for the benefit of which it was held previously to such transfer;" and by sub-s. 2: "If at any time after a rural sanitary authority has become invested with the powers of a highway board . . . . the boundaries of the district of such authority are altered, the powers and jurisdiction of such authority in their capacity of highway board shall be exercised within such altered district . . . ." evidently shews that the boundaries might be altered under this section, so there is nothing to induce me to suppose that the legislature intended to repeal the authority conferred by s. 39 of the Act of 1862. If they had intended that this section should operate as a repeal of s. 39, I should have expected to find some repealing clause in the Act. An argument, however, has rather troubled me arising under s. 39, which says any highway district formed under *this* Act, that is under the Act of 1862, may be altered by the addition of or subtraction therefrom of any parishes in the same county. A question might have been raised whether or not, where a highway district is formed under the provisions of this latter Act of 1878, it can be said to be a highway district formed under the provisions of the Act of 1862, and I am rather more inclined to doubt the opinion to which I have come when I read s. 7, which, after enacting that the expenses of highway boards are to be paid out of the district fund, provides "that if a highway board think it just, by reason of natural differences of soil or locality, or other exceptional circumstances, that any parish or parishes within their district should bear the expenses of maintaining its or their own highways, they may (with the approval of the county authority or authorities of the county or counties within which their district, or any part thereof, is situate) divide their district into two or more parts, and charge exclusively on each of such parts the expenses payable by such highway board in respect of maintaining and keeping in repair the highways situate in each such part; so, nevertheless, that each such part shall consist of one or more

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highway parish or highway parishes." My Brother Denman reminds me that it is found as a matter of fact in the case that the parish of Elmley was previous to April, 1884, one of the parishes forming part of the district of the Sheppey highway board constituted by order of justices under the Highway Act, 1862, so that in April, 1884, it was certainly constituted under the first Act, and no doubt while it remained part of the district constituted under the Act of 1862 an order might have been made under s. 39 of that Act. But what has made me entertain a doubt is this: before the order was confirmed excluding the parish of Elmley from the rural sanitary district constituted by the order making the sanitary board the rural district highway board, the district to which Elmley belonged was the district formed under the Act of 1878, and I can well conceive these two Acts working together; so long as the rural sanitary authority are not in a condition to become, or do not actually become, the highway board they have a right under the Act of 1862 to deal with the parishes *at their will*, and so the section would not be repealed so long as any parishes remained under the rural sanitary authority, and therefore I can well understand that up to the order constituting the sanitary authority the highway board, the Act of 1862 might be in full operation so far as regards the particular parish. But the difficulty to my mind now is that when the order was made immediately preceding the order in question, by that first order there was a new discretion under the Act of 1878, and in s. 7 of that Act there is provision made for exempting parishes from paying more than a fair share of the expenses of the highway board. That, however, is a matter to be decided by the rural sanitary authority, because the language of the proviso in s. 7 is, "provided, that if a highway board" (which I call the rural sanitary authority) "think it just . . . they may divide their district into two or more parts," so that with respect to districts formed under the Act of 1862 the justices have power to exclude the whole parish from the area formed under that Act, but if you want to exclude a parish from a district formed under the Act of 1878 you are to have the sanction of the highway board, and if they and the justices concur the area may be divided

into two districts, but there is no provision for setting up the old surveyors. My doubts are not, however, sufficient to lead me to differ, so the order of July should be confirmed.

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Judgment for respondents. Leave to appeal.

Solicitors for appellants: *Sismey & Sismey.*
Solicitors for respondents: *Philpot & Son.*

J. R.

HUXLEY *v.* WEST LONDON EXTENSION RAILWAY COMPANY.
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April 6.

Practice—Costs—Trial with Jury—Jurisdiction of Judge to make Order as to Costs—Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Order LXV., r.* 1.

Per Lord Coleridge, C.J. Where an action is tried with a jury the exercise of the judge's jurisdiction as to costs under Order LXV., r. 1, was not intended by the legislature to be subject to any appeal.

THESE were three actions tried respectively before Lord Coleridge, C.J., with a jury.

In *Huxley* v. *West London Extension Ry. Co.*, *Buszard, Q.C.*, and *A. H. E. Wilmot*, appeared for the plaintiff; and *Murphy, Q.C.*, and *Wightman Wood*, for the defendants.

In *Hughes* v. *Merrett*, *Jelf, Q.C.*, *Henn Collins, Q.C.*, *H. A. Forman*, and *J. O. Rentoul*, appeared for the plaintiff; *Sir C. Russell, A.G.*, *E. Clarke, Q.C.*, and *Crump, Q.C.*, for the defendant.

In *Wood* v. *Madge*, *Kemp, Q.C.*, and *Cooper Wyld*, for the plaintiff; *E. Clarke, Q.C.*, and *J. Macdonell*, for the defendant.

The facts, and the circumstances which led to the following judgment, are fully stated in it.

April 6. LORD COLERIDGE, C.J. In these three cases I have taken time to consider whether or no the costs should follow the event, or whether I, by whom the actions were tried, should "for good cause otherwise order": Order LXV., r. 1.

In all three the verdict was for the plaintiff; in the first case for 50*l.*; in the second for a farthing; in the third for a farthing

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also. The first was an action against a railway company for compensation for injuries alleged to have been incurred through their negligence; the second and third were actions of libel. In the first I declined to exercise any jurisdiction at all, upon grounds to be presently stated; in the second and third I took time to consider whether or no I should exercise it. I ought to add that in all three cases if I had exercised jurisdiction, it would have been, in each case, to deprive the plaintiff of his costs.

It may be as well to state shortly the result of the evidence in the first case, because that case illustrates more pointedly than the other two the reasons on which I have the misfortune to differ from the later judgments of the Court of Appeal. Undoubtedly the legal authority of that Court is superior to mine; and as there exist no means of disputing its jurisdiction except by appeal to the House of Lords, the exercise of it in questions of costs is not often, though it has been occasionally, brought under review.

In the case of *Huxley* v. *West London Extension Ry. Co.* the plaintiff had preferred an extravagant and extortionate claim for compensation—3000*l.*—not merely in the formal statement of claim but in the particulars delivered in the action; he had supported it by fraudulent statements and dishonest acts; and endeavoured to substantiate it before the jury by evidence which they very properly disbelieved. There was, nevertheless, as the jury thought (and I am not prepared to say that they were wrong), *some* cause of action, and, there being no payment into court, the jury found a verdict for 50*l.* I was asked, under these circumstances, to deprive the plaintiff of his costs, and I declined to exercise any jurisdiction in the matter on the distinct ground that the later decisions of the Court of Appeal had made the principles on which such jurisdiction was to be exercised wholly unintelligible to me.

The Act of Parliament—for Order LXV. is in truth an Act of Parliament—from which the Court of Appeal and I alike derive all the jurisdiction in this matter we respectively possess, says—I give the unquestioned meaning of the words—that the judge by whom the action is tried may, for good cause, deprive the plaintiff of his costs. It is not immaterial to observe that the earlier rule,

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which the present rule has varied, was that the judge might act "upon application made at the trial for good cause shewn." Doubts arose as to what the phrases "making application," and making it "at the trial" might mean, and the rule was altered; but I conceive that the later rule left the jurisdiction where the earlier rule had left it, and that the earlier rule shewed, if possible, even more clearly than the later one, that the person who was to exercise the jurisdiction was the person who had heard the trial, who knew the facts, and who could tell better than any other man in the world, certainly better than those who had not heard the trial and did not know the facts, whether the cause shewn were good or no. The Judicature Act, 1873, appears to be emphatically clear in this sense also. The 49th section, which is still law, declares that "no order made by a judge as to costs only, which by law are left to his discretion, shall be subject to any appeal, except by leave of the judge making such order." And, unless Order LXV., r. 1, leaves no discretion, it seems to come distinctly within the words of the statute itself. Such seems to have been the view taken by the Court of Appeal, or rather by eminent judges of that Court, when the question arose some time ago. In *Marsden* v. *Lancashire and Yorkshire Ry. Co.* (1), Lord Selborne, apparently with the assent of Lord Bramwell and Sir R. Baggallay, treats it as a very grave question, whether any appeal from the judge exists, though he does not decide it, nor was it in that case necessary. That was so late as 1881. In 1879 Lord Bramwell, in *Collins* v. *Welch* (2), thus expresses himself: "The only condition annexed to the power of depriving the successful party of costs is that the judge must exercise it at the trial;" and again: "The meaning of the rule is that the judge may give any direction as to costs, provided he exercises his power at the trial." In this judgment, Lord Justice Cotton generally concurred. The present Master of the Rolls, it is true, says that "the word *good* was put into the rule in order to allow an appeal," which prevents the case from being a perfect authority for the absoluteness of the discretion. No one moreover can, I think, read the judgment of Lord Justice Thesiger in *Myers* v. *Defries* (3) without seeing that he

(1) 7 Q. B. D. 641. (2) 5 C. P. D. at p. 32.
(3) 4 Ex. D. 186.

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too inclined to that view as to the judge, for he asserts it without qualification as to the Divisional Court—"with which discretion," he says "no Court has a right to interfere." Yet one would have thought, if the reason of the thing were any guide, that there were better grounds for appealing from the discretion of a Court which had not heard the case, than of a judge who had.

It is curious and interesting to pass from these two cases to the judgments delivered in *Jones* v. *Curling* (1) and those delivered in this very case. In *Jones* v. *Curling* (1) the present Master of the Rolls, and Bowen and Fry, L.JJ., treat the question of good cause existing as a condition precedent to the exercise of the judge's jurisdiction over costs, and further in terms assert that the existence of good cause is a question of *fact*. Yet this might have been said, nay, was said, and said in vain, in cases in which upon old statutes judges had the right, on the one hand to certify so as to give costs if the act complained of were wilful and malicious, and, on the other, to deprive of costs under 43 Eliz. c. 6. See, as examples of such cases which might be multiplied indefinitely, *Barker* v. *Hollier* (2), *Cann* v. *Facey* (3), and *Twigg* v. *Potts*. (4) Yet in those cases, as in the present, the discretion to be exercised was a judicial discretion to be exercised on legal principles, not by chance medley, nor by caprice, nor in temper. In those cases, as in the present, there was a condition precedent, for example, that the act complained of must be wilful and malicious, surely as much a question of fact as whether a cause be good. I should say that neither are, according to ordinary understanding or ordinary language, anything the least like questions of fact, but most clearly questions of opinion. Nevertheless, every one knows that the regular and unbroken tradition of the Courts was that it was for the judge at the trial to form his opinion, to certify on that opinion, and to certify without appeal. The Courts of those days, full of men of whom it is no disrespect to the Court of Appeal to say that they were at the very least the equals in weight and authority of any of the judges of that Court, steadily and pointedly refused to listen to the argument that the act must be wilful and malicious before

(1) 13 Q. B. D. 262.
(2) 8 M. & W. 513.
(3) 4 A. & E. 68.
(4) 4 Dowl. 266.

the power of certifying arose; that whether it was wilful and malicious was a question of fact, and that if the fact did not exist the certificate was subject to review. Whether a train of circumstances taken altogether give to an act a wilful and malicious character, is, I must think, to common understandings as clearly a matter of opinion and not of fact as any matter which can be presented to the mind of man. I must think also that whether a train of circumstances does or does not make out a good cause for interference is as clearly to common understandings a matter of the same sort, i.e., of opinion and not of fact, as anything which can be presented to the mind of man. Yet, though the conditions precedent, so to call them (I think inaccurately), must exist in both sets of cases, it was the inflexible rule of the old Courts to treat them as to be determined by the judges without appeal in the one set of cases; it is the recent practice of the Court of Appeal to treat them as subjects of appeal in the other.

The analogy drawn from the practice of the Court of Chancery in cases of committals for contempt for disobeying injunctions and the like appears to me, I own, inexact and misleading. A man is ordered not to put up a chimney, or by a mandatory injunction to pull one down, and if he disobeys he is to be committed. A judge is satisfied that he has disobeyed and orders his committal. He appeals, and shews to the Court either that in fact he has not put up the chimney, or that in fact he has pulled it down. This certainly is a question of fact and nothing else; but for the fact the jurisdiction does not arise; and the existence of the fact being conclusively disproved, with the fact away goes the jurisdiction. But what has this in common with a judgment—a moral judgment—formed upon all the facts of the case, as to whether a judge should act or no? "Good" is a word implying a moral judgment; a good man, good conduct, good grounds for a proceeding, good motives for an action, good results from it—in all these no man I should say would or could doubt that "good" implied opinion, and could not, without doing strange violence to English expression, imply a question of fact; though in a strained and wholly unnatural sense, whether a man is good, or a motive is good, or a course of conduct is good, may be treated as a question of fact. But no one would think in the cases

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supposed of so treating it—why then in the case of good cause? "Good cause shewn" in the old rule—to whom? Plainly, the judge at the trial. "Good cause" in the new rule before the judge "orders otherwise" as to costs—good cause in whose opinion? Plainly, the judge's. Good or bad cause is surely, by the very terms, a moral, or, at least, an intellectual question; most unquestionably I should say, but for the judges of the Court of Appeal, not a question of fact. It is a question about which opinions will differ, as to which it is tolerably certain that there will be a wide divergence, and which it is desirable to treat as a question of fact only if it is wished to multiply appeals, and to introduce the interesting element of certain uncertainty into the otherwise strict and certain science of the law.

I am quite aware that interference with discretion where it exists is very courteously disclaimed, and the claim is limited to inquire into the jurisdiction to exercise the discretion. But when the discretion depends upon a moral judgment and follows inevitably from it, and the moral judgment is reviewed, what is this but to review the discretion? I am aware indeed of the old rule that inferior Courts cannot give themselves jurisdiction, but that they can decide without appeal upon the facts on which this jurisdiction depends. The logic of *Reg.* v. *Bolton* (1) and of *Brittain* v. *Kinnaird* (2) may be unimpeachable, but the result, as of much other good logic, is practically startling to all but legal minds; yet, at least, the effect of these rules is to uphold the action of Courts and to reject as far as possible all opportunities of questioning and reversing them, whereas the effect of the present system of appeals is obviously directly the contrary. In *Jones* v. *Curling* (3) it does not seem to have been contended by any one that the order which was reversed would not have done justice; whereas the ordinary rule left the person who had succeeded as to half the questions in dispute to pay the whole general costs of the trial. But that the order would have done justice was not, in the opinion of the Court of Appeal, "good cause" for making it, and it was made therefore without jurisdiction. The justice of it was, in a question of "good cause," an

(1) 1 Q. B. 66. (2) 1 B. & B. 432.
(3) 13 Q. B. D. 262.

altogether irrelevant consideration. Nor have I been so fortunate as to be able to gather either from *Jones* v. *Curling* (1) or from any other case what in the judgment of the Court of Appeal *is* good cause for interference; though I have gathered that certain things which, but for these decisions I should have thought were good cause, are not. Certainly the striking and vigorous language of Sir George Jessel in *Cooper* v. *Whittingham* (2), cited in the judgments of the Court in *Jones* v. *Curling* (1), is no such guide. Sir George Jessel was speaking as a judge of first instance, and was discussing, not his power, but how he should use it, not the existence of his jurisdiction, but the wise and sensible rules by which he should regulate the exercise of it.

In the present case, however, the Court appear to me to have advanced beyond the decision in *Jones* v. *Curling* (1), for though they are good enough to say that the judge would have received their approval, if he had exercised his discretion in the way in which he would have exercised it, if he had exercised it at all, &c., they discuss the whole matter as if it were res integra, as if they had heard the case, and seen the witnesses; and arrive at last, after argument, at the conclusion that a fraudulent claim supported by fraudulent evidence and dishonest acts, i.e., that a claim which they think fraudulent, supported by evidence which they think untrue, and by acts which they think dishonest, would have furnished that condition precedent which as a question of fact they think essential to the exercise of the jurisdiction. And one of their Lordships, if he is rightly reported, suggests that "the proper *order* for the Court of Appeal to make is to *allow* the Chief Justice, with the expression of their opinion, to exercise his discretion as to the costs of the action." Such language speaks for itself, nor is it, perhaps, worth the time it has taken to mention it; what is more important is that it follows from this judgment that it was quite open to the Court to decide the other way, and to have held that all the things mentioned by them did *not* constitute good cause; that if, instead of 50*l.*, 100*l.* or 150*l.* had been recovered, I should have been without jurisdiction to deprive a fraudulent and oppressive plaintiff of his costs, and that every order of a judge as to costs under all circum-

(1) 13 Q. B. D. 262. (2) 15 Ch. D. 501.

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stances is matter for appeal, in spite of the direct words of the Act of Parliament; in spite, as I should respectfully say, of established legal principle, and of what I venture to call good sense. And this further seems to follow: all action by a judge in a cause must be judicial; every order by a judge made in an action must be a judicial order; whether expressed in a statute or implied by law, equally, as I think, there must be good cause for it. An order to postpone a trial on payment of the costs of the day—to examine a witness at the expense of this or that party to the action—every step in an action, from the least to the greatest, is, upon the principles of this judgment, matter for appeal. Once grant, as you must grant, that every judicial act must have good cause for it, and then make the astonishing assumption that whether a judge's opinion is well founded is a question of *fact*, and it necessarily follows that every act of a judge may be questioned, not in terms on its merits, but for want of jurisdiction.

I am quite conscious that cases may be put in which it seems strong to say that there is to be no appeal from discretion; judges, even the highest, are but men; and as men they may make mistakes, nay, I do not deny that they *may* unconscientiously misuse the great powers entrusted to them. But I answer, in words which I have used before, and which I repeat only because I can find none better to express my own meaning:—in the matter of costs "the statute seems to me for convenience and for the conduct of business to trust the judges; to assume that they will act with conscientiousness and in good faith. It is not suggested here that there was want of either; but if there were in any supposable case such a want, it is, I think, the least of two evils and better on the whole that now and then a wrong order should be made, than to do violence, as I think we should, to the language and intention of the statute by allowing an appeal in a matter utterly unsuitable to it, and committed by Parliament itself to the conscience of the judges:" *Ormerod* v. *Todmorden Mill Company*. (1) Amongst many admirable changes which the Judicature Acts have introduced, there is one change which has followed on them by no means admirable—the very large increase in the costs of litigation, due chiefly to the multi-

(1) 8 Q. B. D. 664.

plication of appeals in matters which before their passing were unappealable. I am indeed powerless to alter a state of things which very naturally drives business in increasing quantities from the courts to private tribunals; but I may with all respect record my regret at and dissatisfaction with decisions which extend appeals to matters never meant, as I think, to be appealable, upon principles which, if logically followed, would render litigation, in these courts at least, interminable, and the plague of costs more intolerable than ever. "Boni judicis est," no doubt, "ampliare jurisdictionem suam;" or, as Lord Mansfield and Lord Abinger have said, to amplify the remedies given by a jurisdiction which is admitted to exist, not at all, "arrogare sibi jurisdictionem non suam."

I remain, therefore, of opinion that the decisions of the Court of Appeal on which I have commented do for all practical purposes substitute, in a way not intended by the law, that Court for the judge who presided at the trial as the tribunal to decide what is "good cause," and therefore whether or no a delinquent party is to be deprived of his costs. The inconvenience is extreme, because, although I know after a fashion my own mind, it is not possible for me to know the minds of others differently constituted, and not having the same materials for judgment. The impediment thus created to a free and healthy exercise of discretion is too obvious to be stated. These decisions, however, bind me, and the question is what, having due regard to the interests of the suitors, I ought to do in the cases before me. In the first case the Court of Appeal have been convinced after argument that fraud and falsehood and extortion in a plaintiff may be properly visited by a deprivation of his costs. I needed no argument to convince me, but as the Court has intimated that if I had acted on my own judgment they would have agreed with me, I think I may in that case order that the plaintiff shall be deprived of his costs without any serious risk of exposing the defendant to the expense and annoyance of having his order reversed as being made without jurisdiction. I accordingly make the order, although it is no doubt very possible that on a second appeal and on further argument the Court of Appeal may change its mind and hold that there was no good cause

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for making the order. In the next case, *Hughes* v. *Merrett*, I am in more difficulty. In that case the jury found a verdict for the plaintiff with a farthing damages, which in former days would of itself have deprived the plaintiff of his costs unless the judge had interfered to give them. In this case the real defendant, Baron de Worms, had already recovered 500*l.* from the plaintiff in a cross action, in which action the defendant counterclaimed (and was beaten) for the very libel on which as plaintiff he claimed in this. To my mind the plaintiff substantially failed and the defendant substantially succeeded; and the action should never have been brought. But all these facts may very probably strike the Court of Appeal differently, and it may turn out that my order is, in their opinion, made without jurisdiction. But if the defendant chooses to run this risk I think him entitled to the order he desires, and I accordingly order that the plaintiff shall recover no costs in his action.

In the remaining action it was plain that the plaintiff had very little cause of complaint, if any; and Mr. Clarke consented to a verdict for the plaintiff with one farthing damages without apology, understanding, as he said, and no doubt truly said, that I should interfere to deprive the plaintiff of his costs. But for the decisions in the Court of Appeal I should undoubtedly have done so, as the action was utterly trumpery, and ought not to have been brought. That is my clear opinion; but it is, as now decided, a question of fact, and on this fact, which is said to give or not to give jurisdiction, the Court of Appeal will very likely arrive at a totally different conclusion. Subject, therefore, of course, to what may be their finding on this issue of fact, I order, on what seems to me good cause, that the plaintiff in this action should not recover any costs.

I make no apology for the length of this judgment. The question is important, and I am anxious that it should be fully considered. I make none either for the strength of some of the expressions which I have used. If I have spoken strongly it is because I have felt strongly. It cannot be necessary to disclaim all intentional offence. For the Court of Appeal I have, as every lawyer must have, deep and genuine professional respect. But I think that in their recent decisions on this matter they have

unnecessarily, and therefore mischievously, interfered with the discretion of the judges. I do not speak of their dignity and independence. These are personal, and may exist and be displayed as well by the youngest magistrate of the smallest borough, as by the Lord Chancellor himself. But I speak of an interference which, if unnecessary and uncalled for, is a practical impediment to the due administration of justice, lessens the authority, and therefore the usefulness, of the judge, fetters the free and conscientious exercise of that discretion which, in right hands and rightly used, is one of the most precious as well as the most powerful weapons in the armoury of justice, and adds to the difficulties and expenses of the suitor, already grievous to be borne. I was brought up under a system in which discretion when given was practically absolute. It was the unbroken tradition of Westminster Hall. I believe that system worked justice and saved expense. I hope I may be forgiven if, with what energy remains to me, I strive after many years' experience and drawing near the close of my judicial career, to preserve this unfettered discretion which, in my opinion, was given me by Parliament, and which I have never, at least intentionally, abused.

Orders accordingly.

Solicitors in the first case: *H. B. Bell*, for the plaintiff; *Heggerty*, for the defendants.

Solicitors in the second case: *Edwin Hughes*, for the plaintiff; *Lewis & Lewis*, for the defendant.

Solicitors in the third case: *Storry*, for the plaintiff; *W. F. Tindell*, for the defendant.

W. A.

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May 14.

[IN THE COURT OF APPEAL.]

THE DEWSBURY AND HECKMONDWIKE WATERWORKS BOARD, APPELLANTS; THE ASSESSMENT COMMITTEE OF THE PENISTONE UNION, RESPONDENTS.

Poor-rate—Principle of Assessment—Land occupied by Local Authority for Public Purposes—Waterworks—Water-rate in aid of Water-rents.

The appellants, a local board incorporated by a special Act (39 & 40 Vict. c. clxxxv.), were empowered by the Act to levy a public water-rate, but it was provided that they should not levy any higher rate than might be required to discharge so much of the expenses of maintaining the waterworks, &c., as the amount of water-rents and other payments for a supply of water should not be sufficient to discharge :—

Held (affirming the judgment of the Queen's Bench Division), that, in assessing the appellants to the poor-rate in respect of their reservoirs, pipes, and works, the amount collected by means of a water-rate ought to be taken into account.

APPEAL from the order of the Queen's Bench Division (Manisty and A. L. Smith, JJ.) upon a special case for the opinion of that Court, under 12 & 13 Vict. c. 45, s. 11. The case is reported (1), where the facts are fully stated. The question was as to the principle of the assessment to poor-rate of certain property of the appellants situate in the respondents' union.

The appellants were a waterworks board incorporated under s. 3 of the Dewsbury and Heckmondwike Waterworks Act, 1876 (39 & 40 Vict. c. clxxxv.).

The respondents were the assessment committee of the Penistone Union in the West Riding of Yorkshire.

Sect. 47 of the Act provided that all expenses and receipts of the waterworks board should be divided between the Dewsbury Corporation and the Heckmondwike Board in certain specified proportions.

Sect. 99 authorized the Dewsbury Corporation within the borough of Dewsbury, and the Heckmondwike Board within the Heckmondwike district, to charge certain maximum rents for the supply of water to the occupiers of houses within the borough

(1) 16 Q. B. D. 585.

and the district respectively. Sect. 105 empowered the Dewsbury Corporation within the borough and the Heckmondwike Board within the Heckmondwike district respectively to cause a rate, to be called "the public water-rate," to be levied within the borough or district once in every year, or oftener as occasion might require, either prospectively in order to raise money for the payment of future expenses, or retrospectively in order to raise money for the payment of expenses already incurred, or partly prospectively and partly retrospectively. Sect. 106 provided that when the Dewsbury Corporation or the Heckmondwike Board should have paid off the amount which they were respectively by the Act authorized to borrow, the corporation or the board, as the case might be, "shall not thereafter levy any higher public water-rate than may be required to discharge so much of the expenses of maintaining, repairing, restoring and extending the waterworks, and of carrying this Act into execution with reference thereto, and of any damages, penalties, or other payments which the corporation or the board, as the case may be, may, under the provisions of this Act, be liable to pay or contribute towards, as the amount of water-rents and other payments for a supply of water which the corporation or board may under the provisions of this Act be entitled to, shall not be sufficient to discharge."

Par. 8 of the special case stated that "the amount paid for interest upon borrowed moneys during the year 1882 by the appellants was the sum of 9902*l.* 3*s.*, and the amount received during the same year by the appellants was the aggregate sum of 15,878*l.* 17*s.* 1*d.*, of which 6,127*l.* 4*s.* 10*d.* was received from public water-rates, and 9,751*l.* 12*s.* 3*d.* from water-rents. The public water-rates are levied to supply, and do supply, any deficiency between the expenditure and the amounts received from the water-rents, which are the maximum rents allowed by the Act."

The question was whether, in estimating the rateable value of the appellants' property, the public water-rate was to be taken into account as well as the water-rents.

The Queen's Bench Division decided that the water-rate was to be taken into account.

The board appealed.

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DEWSBURY WATERWORKS BOARD v. ASSESSMENT COMMITTEE OF PENISTONE UNION.

A. Charles, Q.C., and *West*, for the appellants. A hypothetical tenant of the waterworks, in considering what yearly rent he should offer, would not take into account the fact that a rate could be levied in aid of the water-rents. He could never get a farthing of the rate. The maximum water-rent which the appellants could levy might produce a profit, and the question is what yearly rent the hypothetical tenant would pay.

[FRY, L.J. Is not a man who may make a profit, and who cannot make a loss, in a better position than one who may make a loss?]

The question is whether the occupation is beneficial, and the fact that there cannot be a loss does not make it beneficial. If the water-rents, plus the rate, are never more than zero, there is no beneficial occupation. If the rents are more than zero, the appellants are willing to be rated on the excess. The rate is purely a rate in aid of loss, and, for the purpose of assessment, the question is as to the profit of the occupier: *Mayor, &c., of Peterborough* v. *Stamford Union* (1); *West Bromwich School Board* v. *Overseers of West Bromwich* (2).

Moreover, the rate is not sufficiently connected with the occupation to be taken into account in assessing the property for poor's-rate: *Reg.* v. *Christopherson.* (3) In that case the rector of a parish, under the provisions of a local Act, received annually the proceeds of a rate, called the rector's rate, made upon the owners of houses, &c., and the Court of Appeal held that he was not rateable to the poor-rate in respect of the amount so received, the same not being in lieu of tithes.

[The other points which were argued before the Divisional Court were not raised before the Court of Appeal.]

Jelf, Q.C., and *Castle*, for the respondents, were not heard.

LORD ESHER, M.R. The facts stated in the special case shew that, by reason of the legislation with regard to this water corporation, they are entitled to levy a water-rent up to a certain maximum, and if, when they have done that, the water-rents do not in any one year cover their expenses, then, either directly by

(1) 31 W. R. 949. (2) 13 Q. B. D. 929.
(3) 16 Q. B. D. 7.

one step or indirectly by several steps, they are entitled to levy a rate in aid to make up the deficiency in that year—the difference between the amount of the water-rents and the amount of the expenses. There is nothing in the special case to shew that the water-rents will always in every year be deficient. The appellants relied on the latter part of the 8th paragraph, which states that "the public water-rates are levied to supply, and do supply, any deficiency between the expenditure and the amounts received from the water-rents, which are the maximum rents allowed by the Act." That seems to me to be no more than a statement that, when the maximum water-rents are deficient, then the water-rate is levied.

Then the question is, whether that power of obtaining the water-rate in aid ought to be taken into account in estimating the annual value of the appellants' property.

The legal principle is this: You are to take the annual value (subject to all the deductions which ought to be allowed) of the property to be the rent which a hypothetical tenant from year to year would give for it if he had it upon the same terms as the actual owner (i.e. in the present case this water authority or corporation) has it. In that view the head-note to *Mayor, &c., of Peterborough* v. *Stamford Union* (1) must be expanded, and read thus (adding the words in italics): "Where land is occupied by a local authority for public purposes the land is to be assessed to the poor-rate at the rent which a tenant would pay, it subject to the same restrictions as are imposed, *and entitled to the same advantages as are conferred*, upon the local authority." That is the true doctrine. Then the question is this, is it an advantage to a man to hold land upon these terms, viz., that, if there is a deficiency in the rents which he can obtain in any one year, he has a right to have that deficiency made up by a rate, but, if in any one year the rents which he obtains are more than his expenses, then he has the advantage of the profits? Of course it is a great advantage to a tenant that he can never lose in any one year, while in other years he may gain, and that advantage must be taken into account in estimating the rent which he would give for the land if he were placed in the same position as

(1) 31 W. R. 949.

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Lord Esher, M.R.

the actual owner. That is the true principle, and we are only asked to lay down the principle. It seems to me, therefore, that the decision of the Divisional Court was quite right.

Then the second point consisted in likening this case to *Reg.* v. *Christopherson* (1), in which the rector of a parish received an income independently of tithes. In that case we held that it was very much the same thing as if a tenant was by other means a rich man; in such a case his riches derived aliunde would not be an advantage or a disadvantage to the business which he was carrying on; they would be no part of the business. Those riches would be a wholly independent thing. In the present case the very thing—the rate in aid—which is to prevent a loss in the carrying on of the appellants' business is an advantage to the business itself; it is an advantage to the land which they are using for the purpose of their business. Therefore, on that point also, I cannot say that the decision of the Divisional Court was wrong.

BOWEN, and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Ridsdale & Son, for Chadwick & Sons, Dewsbury.*

Solicitors for respondents: *Torr & Co., for Dransfield & Sons, Penistone.*

(1) 16 Q. B. D. 7.

W. L. C.

[IN THE COURT OF APPEAL.]

1886
May 28.

EX PARTE REGISTRAR OF CROYDON COUNTY COURT.
IN RE WISE.

Bankruptcy—Refusal of Registrar of County Court to carry out Order of Court of Appeal—Procedure to compel Obedience—Jurisdiction.

Upon appeal from a county court in a bankruptcy proceeding, the Divisional Court allowed the appeal, and ordered money, which had been paid into the county court to abide the result of the appeal, to be paid out to the appellant. The Divisional Court also gave leave to appeal to the Court of Appeal, but made no order for a stay of proceedings. The registrar of the county court having refused to pay out the money until the time for appealing to the Court of Appeal had elapsed:—

Held, that the refusal was unjustifiable, but that, the registrar being an officer of the county court, the Divisional Court had no jurisdiction over him personally to enforce compliance with the order.

APPEAL from an order made by Cave and Grantham, JJ., that the registrar of the Croydon County Court should at once pay a sum of 450*l.* out of court to W. P. Brown, and that he should also pay the costs of Brown of the motion upon which the order was made, and his costs of and occasioned by the refusal of the registrar to pay the 450*l.* out of court to Brown.

On the application of the trustee in the bankruptcy of H. J. J. Wise, an order was made by the Croydon County Court, declaring that a post-nuptial settlement which the bankrupt had executed was void as against the trustee in his bankruptcy, and giving the trustee of the settlement leave to appeal to the Divisional Court, on the terms of his paying 450*l.* into court. The 450*l.* was paid into court by Brown, who was the trustee of the settlement, and the money was then under the control of the registrar. On the 1st March, 1886, the appeal was heard by the Divisional Court, when the Court held that the settlement was not void, and discharged the order of the county court, and ordered that the 450*l.* should be paid out of court to Brown. The Court also gave leave to appeal to the Court of Appeal, but no order was made for a stay of proceedings pending the appeal. When this order was drawn up it was placed in due course on the file of the proceedings in the bankruptcy, but it was not served on the registrar of the

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county court. On the 22nd March, 1886, Brown's solicitors wrote to the registrar, asking him to remit the 450*l.* to them on behalf of Brown. At this time the file of the proceedings, which had been sent to London because of the appeal, had not been returned to the county court. On the 31st March, the file of proceedings having been returned, Brown's solicitors wrote again to the registrar, asking him to remit the 450*l.* to them. On the 1st April the registrar wrote in reply, that he could not part with the 450*l.* until the time for an appeal against the order of the Divisional Court had expired. On the 2nd April Brown's solicitors again wrote to the registrar pressing him for payment of the 450*l.*, but he persisted in his refusal, and insisted on retaining the money until the appeal, notice of which had meanwhile been given by the trustee in the bankruptcy, should have been disposed of. The appeal was heard by the Court of Appeal on the 16th April, and was dismissed. On the 17th April Brown's solicitor went to Croydon and had an interview with the registrar, when he informed him of the dismissal of the appeal. The registrar still refused to pay out the money, until he had seen the order of the Court of Appeal. On the 19th April a notice of motion in the Divisional Court was given on behalf of Brown, calling on the registrar to shew cause why the 450*l.* should not be paid out forthwith to Brown. This motion was heard by the Divisional Court on the 21st April, 1886. The registrar did not take any objection to the jurisdiction of the Divisional Court.

H. D. Greene, Q.C., and *F. Cooper Willis*, for the motion.
Frank L. Wright, for the registrar.

Cave, J. It is perfectly clear that the registrar has mistaken his duty in this matter. His duty was to obey the order of this Court as soon as he became aware of it, and the order of this Court was, that, notwithstanding that an appeal was pending, the money should at once be paid out. He has not even now, after he has been informed of the result of the appeal, paid out the money, and his conduct has put the unfortunate applicant to the expense of coming here to-day. He must undoubtedly pay the costs of this motion, and even that is but an inadequate

compensation to the applicant, because, owing to the registrar's misunderstanding his powers, and clearly committing a contempt of Court by not obeying the order, the applicant has been deprived of the interest upon the money for six or seven weeks. The least we can do is to direct the registrar to pay the money out at once, and to pay the costs of this motion and the costs of and occasioned by his refusal to obey the order of the Court.

GRANTHAM, J., concurred.

The registrar appealed.

May 28. *Muir Mackenzie*, and *Herbert Reed*, for the registrar. The order of the Divisional Court was never served on the registrar. The practice in this county court has always been not to pay out money which has been paid into court, till after the time has expired for appealing from the order which directs that it shall be paid out. The registrar was right in declining to pay the money out until the order of the Court of Appeal was produced to him. He knew there had been an appeal, and, until the order of the Court of Appeal was produced to him, he could not tell whether the order of the Divisional Court had been discharged. At any rate he is an officer of the Court, and was acting bonâ fide in the discharge of his duty, and he ought not to be punished by being made liable to the payment of costs. In order to found a proceeding against him by way of process for contempt, the order should have been served on him personally.

Lastly, the Divisional Court had no jurisdiction to make the order appealed from. The registrar is not an officer of the Divisional Court. He is an officer of the county court, and, if he has failed in the discharge of his duty as an officer of that court, any application to compel him to perform his duty ought to have been made to the judge of his own court.

H. D. Greene, Q.C., and *F. Cooper Willis*, for the trustee of the settlement. The Divisional Court had power to enforce its own order, and to punish as a contempt of Court any disobedience of it. The registrar is an officer of the Court, and, when the Divisional Court has made an order which it is the duty of the county court to carry into effect, the High Court has juris-

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diction to commit him for contempt if he refuses to obey the order.

LORD ESHER, M.R. The Lord Chancellor (1), who has heard really the whole of the argument, has requested me to say that he agrees with the judgment which we are about to pronounce.

The Divisional Court reversed the decision of the county court, and gave judgment that the settlement which was in dispute was valid, and ordered that the money which had been paid into court by the trustee should be paid out. That order was placed on the file of the proceedings in the bankruptcy and was brought to the attention of the registrar. If it was not specifically brought to his attention, he ought to have known of it. He took upon himself to say that, notwithstanding that order, he should retain the money until the time for appealing from the order had expired, and that, if an appeal should be presented before the time had expired, he should retain the money pending the appeal. Anything more absolutely wrong I cannot conceive. The order of the Divisional Court was the order which his own Court ought to have made, and he ought to have obeyed that order at once. If he had considered the matter at all he would have seen, that in no court does an appeal of itself operate as a stay of proceedings. He was absolutely wrong in what he did, and if, as he says, it has been the practice of his own court during a period of eighteen years to treat an appeal as a stay of proceedings, that practice has been wrong. But, nevertheless, the order which he disobeyed was an order of the Court of Appeal from the county court, which was in the nature of a direction to the county court. It was the order which the county court ought to have originally made, and it was the duty of the county court to carry it out. But the next question is, whether, if an officer of the county court does that which is wrong, it is possible to come to the Divisional Court to enforce its own order by committing for contempt the officer of the county court? In my opinion, the Divisional Court, when it has pronounced its order, has nothing more to do with it. It is the duty of the county court to carry out the order, and the

(1) Lord Herschell, L.C., had left the court before judgment was pronounced.

Divisional Court has no power upon an original motion to enforce obedience to its own order. I doubt whether the Divisional Court could enforce the payment of the costs of the appeal; but it certainly could not enforce the carrying out of the rest of the order. When the officer of the county court dared to disobey an order which he ought to have treated as the order of his own court, the proper course to compel him to obey was to apply to the county court. The application was made to the wrong Court—to a Court which had no jurisdiction in the matter, and on this ground the appeal will be allowed. I desire to say that I have no doubt but that the registrar of the county court only made a mistake in law.

FRY, L.J. I entirely concur in what has been said by the Master of the Rolls. The conduct of the registrar seems to me to be worthy of censure. But the question is, whether the Divisional Court had any jurisdiction to order him to pay costs. It is argued that they had power to enforce their order by process of contempt. But the order was not an order on the registrar personally. It ordered that the money should be paid out of court to the trustee. If the trustee desired to enforce the order by process of contempt, he ought at any rate to have obtained a further order, specifying the person who was to make the payment and the time within which he was to make it. If such an order could have been obtained (as to which I express no opinion), it was not, and the Divisional Court had no jurisdiction to make the order which they did make.

Appeal allowed.

LORD ESHER, M.R. We give no costs in either court.

Solicitor for registrar: *J. E. Fox.*
Solicitors for trustee: *Clarkson, Greenwell, & Wyles.*

W. L. C.

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March 13, 15.

THE QUEEN *v.* THE JUSTICES OF GENERAL ASSESSMENT SESSIONS FOR THE METROPOLIS.

Metropolis—Valuation Acts—Assessment Sessions—Appeal—Notice of Appeal—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 33.

The assessment committee of a union appealed, under s. 32 of the Valuation (Metropolis) Act, 1869, to the general assessment sessions against the valuation list of the respondent parish, and against the total gross and rateable values appearing therein, on the ground that those values were too low, and it appeared from the case stated by the appellants in compliance with the rules made under the Act that they sought to have the total values increased by shewing that the assessments in the valuation list of a large number of specified hereditaments were too low:—

Held, that the appeal did not "relate to the unfairness or incorrectness of the valuation of any hereditament occupied by any person other than the appellant" within the meaning of s. 33 of the Valuation (Metropolis) Act, 1869; that those words applied only to appeals in which it was objected that the valuation of particular hereditaments was unfair or incorrect so far as it affected the assessment of the ratepayers of a parish inter se; and therefore that the appellants need not serve notice of appeal under s. 33 upon the occupiers of the specified hereditaments.

Rule calling upon the justices of the general assessment sessions for the Metropolis to shew cause why a writ should not issue to prohibit them from further proceeding upon the hearing of an appeal by the assessment committee of the Fulham Union against the valuation list of the parish of St. Mary Abbotts, Kensington, and against the totals of the gross and rateable values appearing in such list.

The rule was obtained on behalf of the parish of St. Mary Abbotts, Kensington, on the ground that the justices of the general assessment sessions had no power to hear the appeal.

On the 12th of January, 1886, the assessment committee of the Fulham Union gave notice to the assessment committee of the parish of St. Mary Abbotts that they intended at the next court of general assessment sessions to be holden under the Valuation (Metropolis) Act, 1869, to appeal against the valuation list of the parish of St. Mary Abbotts, approved and certified on the 31st of October, 1885, by the assessment committee of that parish.

The notice of appeal recited that the appellants felt aggrieved by reason of the total of the gross value and the total of the rateable value respectively appearing in the valuation list of the respondent parish being too low, and stated that the appellants desired to have the valuation list corrected by increasing the totals of the gross and rateable values respectively in the manner specified in the notice.

On the 1st of February the appellants delivered, under r. 5 of the orders of the 23rd of June, 1870, made by the court of general assessment sessions under the Valuation (Metropolis) Act, 1869, a statement of their case in writing to the respondents, the material allegations of which were as follows:—

1. This is an appeal by the assessment committee of the Fulham Union by reason of their being aggrieved by the total gross value of the parish of St. Mary Abbotts, Kensington, being too low, and by the total rateable value being too low.

5. The appellants will contend that the valuation list of the said parish should be corrected by increasing the total gross and rateable values in the valuation list from the sums of 2,154,278*l.* and 1,806,599*l.* to the sums of 2,332,955*l.* and 1,958,425*l.* respectively, or to such further or other sums respectively as the Court may determine to be the true gross and rateable values of the rateable hereditaments.

6. The several hereditaments situated in the parish of St. Mary Abbotts, Kensington, and mentioned in the third column of the schedule hereto, are valued in the valuation list under appeal at the gross and rateable values appearing opposite to them in the 4th and 5th columns of such schedule.

[The schedule appended to the case consisted of a list of about 600 hereditaments appearing in the valuation list under appeal. In the first column the district number, and in the second the assessment number, of each hereditament was specified; in the third column the name or situation of the property was described; in the fourth the gross values; and in the fifth the rateable values of the hereditaments, as finally determined by the assessment committee were respectively set forth; and in the sixth the gross value, and in the seventh the rateable value respectively as estimated by the appellants were set forth.]

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7. The hereditaments numbered 116 to 127 (inclusive) and 129 and 130 in the schedule are the premises or works of railway companies, waterworks companies, and gas companies, and in the quinquennial valuation list, which came into force in the year 1881, the premises and works of those companies were valued as follows:—[Here the values were stated.]

8. The values of the premises and works of the said companies have greatly increased since the date of the said quinquennial valuation list, but sufficient allowance for such increase, and for additions to such premises and works, has not been made in the valuation list under appeal, nor have the present gross or rateable values of the premises and works of such companies been ascertained by the assessment committee or overseers of the said parish of St. Mary Abbotts, Kensington, or inserted in the valuation list under appeal. [The case went on to refer to a great number of other hereditaments described in the schedule, including schools, a workhouse, an infirmary, a town hall, a vestry hall, dwelling-houses let on repairing leases, other dwelling-houses, shops, hotels, and public-houses, and stated various grounds upon which the appellants contended that those hereditaments were insufficiently valued in the valuation list under appeal.]

23. The appellants say that the respective gross and rateable values appearing in the valuation list under appeal of the several hereditaments mentioned in the third column of the said schedule are not, nor are any of them, the true gross or rateable values of such hereditaments respectively, and are not ascertained in the manner or according to the principles in that behalf provided by the Valuation (Metropolis) Act, 1869, but are less than such true gross and rateable values.

24. The appellants say that the true and proper gross and rateable values of the said hereditaments are not less than the gross and rateable values set opposite the same in the sixth and seventh columns of the said schedule hereto.

The applicants did not serve notice of appeal upon any of the occupiers of the hereditaments comprised in the schedule, nor did they deliver copies of their case to any of those occupiers, none of whom appeared.

The general assessment sessions commenced on the 9th of

February, 1886, and on the following day the respondents made an application to the Court to strike out the appeal on the ground that the appellants had not complied with the provisions of s. 33 of the Valuation (Metropolis) Act, 1869, by serving notice of appeal upon the occupiers of the hereditaments specified in the appellants' case and the schedule thereto.

The justices refused to grant the application, but adjourned the hearing of the appeal until the 23rd of February, and this rule was obtained on the 15th of February.

Sir R. E. Webster, Q.C. (*Poland* with him), for the appellants, shewed cause. It will be said that this appeal to the general assessment sessions related to the unfairness or incorrectness of the valuation of particular hereditaments, and therefore that the applicants ought to have served notice of appeal on the occupiers of such hereditaments under s. 33 of the Valuation (Metropolis) Act, 1869, and ought also to have served a copy of the case under rule 5 of the orders of June, 1870, made under that Act (1). But

(1) 32 & 33 Vict. c. 67, s. 33: "Notice in writing of every appeal, whether to special sessions or to the assessment sessions, specifying the correction which the appellant desires to have made in the valuation list, must be served, within the time in this Act mentioned, on the following persons; namely,

"In all cases on the surveyor of taxes of the district to which the appeal relates, and on the clerk of the assessment committee which approved the list wholly or partly questioned by the appeal:

"When the appeal relates to the unfairness or incorrectness of the valuation of, or to the omission of, an hereditament occupied by any person other than the appellant, or to the incorrectness of any matter stated in the list with respect to any such hereditament, then on such person:

"If an assessment committee or a surveyor of taxes is the appellant, then also on the overseers of the parish to which the appeal relates:

"Provided that it shall not be necessary to serve any notice of appeal on the surveyor of taxes in any case in which the appeal relates only to the rateable value of any hereditament."

Rule 5 of the Orders of the 23rd of June, 1870, made by the justices of the general assessment sessions under s. 27 of the Act, provides that "On or before the 1st of February next following the entry of any appeal, the appellant shall state his case and the facts to be proved, and the points of law (if any) to be argued in support thereof in writing, and shall serve on the clerk to the assessment sessions nine copies thereof for the use of the court, and one copy on each of the respondents," &c.

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the question raised by the appeal is with respect to the proper contribution to be paid by the respondent parish. It is an appeal against total values, and though the rating of particular hereditaments comes in question incidentally, the question of the rating of the ratepayers of a particular parish inter se is not, and could not be, dealt with. The only persons who could properly be made respondents here are the surveyor of taxes, the assessment committee, or the churchwardens and overseers of the poor of the respondent parish. The Valuation (Metropolis) Act, 1869, provides one procedure where an appeal relates to the unfairness of the rating of the ratepayers of a parish inter se, and another where the appeal is in respect of the total values appearing in a valuation list. Separate sets of appeals are provided in both those cases. Sects. 6 to 11 provide for the making and publishing of the valuation list of the parish and for the mode in which "any person who feels himself aggrieved by reason of the unfairness or incorrectness of the valuation of any hereditament," may make his objection before the assessment committee. Sects. 14 to 17 specify the mode in which the valuation list is to be revised, finally approved, and the totals of the gross and rateable values in such list to be ascertained and inserted; duplicates of the valuation list, when it has been certified in the prescribed manner, are to be sent to the clerk of the managers of the Metropolitan Asylum District and to the overseers of the parish to which the list relates respectively, and a printed copy of the totals of all the valuation lists are to be sent by the clerk to every assessment committee, to the overseers of every metropolitan parish, and to other specified authorities of the metropolis. The object of this group of sections clearly was to publish the totals, so that every union or parish might know the total values at which all the unions or parishes had been assessed. Then sections, 18 to 22, provide for appeals to special sessions. By s. 19 any ratepayer and any overseers of a parish "so far as respects the valuation list of that parish" may, if he or they feel aggrieved by any decision of the assessment committee, "on an objection made with respect to the unfairness or incorrectness of the valuation of any hereditament included in such list, but not otherwise, appeal against such decision to the special sessions." By s. 20

the justices in special sessions shall deal only with the values of hereditaments appearing in the valuation list; they have no power to alter totals, nor to hear an appeal touching any matter in respect of which notice of appeal has been given to assessment sessions, and their decision "shall affect only the rights of the ratepayers of such parish among themselves." The appeal to special sessions is therefore limited to cases in which complaints are made with respect to the rating of particular individual hereditaments. Next follow a group of sections, 23 to 32, which provide for the constitution of the court of assessment sessions, and for the hearing of appeals by that court. Two classes of appeals are dealt with in s. 32; first, appeals by ratepayers or surveyors of taxes, or overseers, who may feel aggrieved by any decision of the assessment committee or of special sessions; and, secondly, appeals by assessment committees, overseers, ratepayers, and any body of persons authorized by law to levy rates or require contributions payable out of rates, if they or he feel aggrieved by the total gross value or the total rateable value of any parish being too low.

It is submitted that the appeal in the present case does not relate to "the unfairness or incorrectness of the valuation of any hereditament" within the meaning of s. 33. Those words apply only to the first class of appeals provided by s. 32. It would be impossible to serve on each occupier the notices and documents required by s. 33 and rule 5, because the appellants' information is only that the totals are incorrect. But for the provisions of rule 5 the appellants need not have given the particulars contained in their case, which forms no part of the appeal, and is only required to be stated by way of giving particulars. The status of the respondents is not altered by rule 5. If the appellants had served notices, under rule 5, upon all the occupiers of the hereditaments specified in the case, the court of assessment sessions would have had no power to alter individual assessments in the valuation list, because s. 34 only gives them power to alter the valuation list "so far as it is questioned by the appeal." Sect. 41 shews that the two classes of appeals are intended to be kept distinct; the first part of that section provides that any alteration in the valuation list of a parish to be made as the

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result of any appeal must be made by the clerk of the assessment committee, and by the overseers of that parish, in the duplicates respectively deposited with them; but the second part provides that every alteration of totals to be made as the result of an appeal must be made by "every person and body of persons who has power to make any rate or assessment, or require any contribution based on such total." An opposite construction of s. 33 would lead to an unreasonable result. It might involve serving notices of appeal, and copies of the case under rule 5, upon thousands of occupiers, and there would be a practical impossibility in dealing with the question of totals. If the occupiers of the particular hereditaments specified in the case were brought before the assessment sessions, and their respective assessments adjudicated upon, the result would not be final, because the respondent parish might still say that though the assessments in some instances were too low, in others they were too high, and therefore that the totals were correct.

Sir H. James, Q.C., and *G. M. Freeman*, for the respondents, supported the rule. This appeal relates to the unfairness or incorrectness of the valuation of the particular hereditaments specified in the case, and notice of appeal should therefore have been served upon the occupiers of those hereditaments under s. 33, and copies of the case under rule 5. It is true that under s. 32 a parish or union may appeal in respect of the total gross and rateable value of another parish or union, but under rule 5 the facts upon which the appellants rely to shew that the totals were too low must be stated, and when the case shews that the totals are complained of in respect of the individual assessment of particular hereditaments, the case is brought within s. 33. The Act intended to draw a distinction between objections founded upon some general principle—as where a certain percentage has been taken off all the values—and objections to the rating of particular hereditaments. In the former case the inquiry relates only to what has been done by the public officials, and they only need be made respondents. In the latter case the occupier of the hereditament must be brought before the court. If he is not, there are no materials upon which a respondent parish can defend their assessment.

[MATHEW, J. Where the appeal is against total values, how is the individual ratepayer affected?]

He will for the next five years be assessed at an incorrect valuation, and he has an interest in shewing that he is now properly rated. If he is not brought before the court of assessment sessions an impossible burden is put upon the parish of defending his assessment. Sect. 20 expressly provides that no decision of special sessions shall alter totals, but it is contended that s. 34 gives power to the assessment sessions to alter the assessment of particular hereditaments where the appeal is against total values. If that were not so, the unreasonable consequence would follow that the justices of the court of assessment sessions, which is the ultimate court of appeal where no point of law is involved, might be compelled to stultify themselves by finding total gross and rateable values which differ from the total values arrived at by adding up the particular assessments of hereditaments in the valuation list. In order to determine what is questioned in an appeal, the notice of appeal and the case, which is in effect a statement of the grounds of appeal, must be read together. Here the case in substance states that the appeal relates to the unfairness or incorrectness of the particular hereditaments specified.

Cur. adv. vult.

March 15. MATHEW, J. In this case a rule has been obtained to prohibit the justices of the general assessment sessions of the Metropolis from further proceeding to hear an appeal by the assessment committee of the Fulham Union against the valuation list of the respondent parish. The ground of the appeal was that the totals of the gross and rateable values in the valuation list were too low, and the appellants' object was to have the valuation increased to the correct amount in order to secure an equal distribution of the public burdens of the Metropolis. When the case came before the assessment sessions the respondents objected that, as the ground of appeal was that the rating of particular hereditaments was too low, no proper notices of appeal had been given under s. 33 of the Valuation (Metropolis) Act, 1869, and copies of the appellants' case had not been served on the occupiers of the hereditaments specified in it

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under the 5th rule of the Orders of 1870. Sect. 33 provides that, "when the appeal relates to the unfairness or incorrectness of the valuation of an hereditament occupied by any person other than the appellant," then notice of appeal in writing must be served on such person.

The respondents contended that this appeal was in respect of the unfair or incorrect valuation of a large number of hereditaments, and that, no notices of appeal having been served upon the occupiers of those hereditaments, the justices had no power to hear the appeal. The justices overruled the objection, and this rule for a prohibition was thereupon obtained.

In this Court the appellants' counsel argued that the appeal was not one which, within the true meaning of s. 33, related to the unfairness or incorrectness of the valuation of hereditaments, but that it was an appeal which related to the total values in the valuation list; that the object of the Act was twofold:—first, to secure that the burden of rating should be distributed equally amongst the ratepayers of the parish; and secondly, to secure equal distribution of that burden among parishes; that when the various provisions of the Act were carefully examined it would be found that a separate code of rules was applied to each object, and that the only proper parties to this appeal were those on whom the notices of appeal had in fact been served. We have to decide whether that argument is, or is not, well founded. Upon examining the various sections of the Act in question I am of opinion that it is. Sect. 11 deals with the first division of appeals, and states the grounds upon which "any person authorized by this Act who feels himself aggrieved by reason of the unfairness or incorrectness of the valuation of any hereditament" may object before the assessment committee. That section clearly applies only to objections made by individual ratepayers. Sect. 14 provides for the revision of the valuation list by the assessment committee: when they have finally approved such valuation list they are to cause the totals of the gross and rateable values in such list to be ascertained and inserted in the list: a declaration of approval of the list and a certificate of compliance with the Act is to be signed at the foot of the list in the prescribed manner, and one duplicate of the list, so certified,

is to be sent to the clerk of the managers of the Metropolitan Asylum District, and the other duplicate to the overseers of the parish to which it relates. Any objection made under s. 11 by a person aggrieved in respect of the rating of a particular hereditament is considered by the assessment committee in revising the list, and the totals are ascertained when the list has been revised and finally approved. Then s. 17 points out what is to be done with the totals of the valuation lists when ascertained: they are to be printed, and printed copies to be sent to every assessment committee, and to the overseers of every metropolitan parish, &c., the object being, as was pointed out by the counsel for the appellants, to provide each parish with information as to the totals—the general as distinct from the local burdens—to which they are subject. Then comes a set of provisions with respect to appeals to special sessions. Sect. 18 provides that the justices in each petty sessional division of the Metropolis shall in every year hold a special sessions for hearing appeals against the valuation lists of the several parishes within such division. By s. 19 any rate-payer, and any overseer of a parish, and any surveyor of taxes, so far as respects the valuation list of any parish within the division, may, "if he or they feel aggrieved by any decision of the assessment committee on an objection made with respect to the unfairness or incorrectness of the valuation of any hereditament included in such list, but not otherwise, appeal against such decision to the special sessions." By s. 20 the justices in special sessions shall not hear any appeal touching any matter in respect of which notice of appeal to the general assessment sessions has been served: the justices in special sessions may not alter any part of the valuation list except the part relating to the value of an hereditament, and any alteration by them of the value of an hereditament shall affect only the rights of the rate-payers of such parish among themselves, and shall not of itself in any way alter the totals of the gross and rateable value in such list as settled by the assessment committee, but may form a reason for an appeal against the totals to the general assessment sessions. That section clearly indicates that the legislature intended to draw a line between the rights of individuals to appeal against the assessment of particular hereditaments and the rights

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of unions or parishes to appeal against totals. Next comes a group of provisions with respect to appeals to the assessment sessions, and at the end of that group is s. 32. The first part of that section gives an appeal to the assessment sessions to rate-payers, surveyors of taxes, and overseers, who may feel aggrieved by decisions of the assessment committee, or by decisions of special sessions. Fairly reading that language with ss. 11 and 19, it would seem to refer to that class of appeals in which individuals appeal against the unfair or incorrect assessment of particular hereditaments. The second part of s. 32 goes on to provide for the case of appeals by assessment committees to the assessment sessions if the assessment committee feel aggrieved by reason (1) of the total of the gross value of any parish being too high or too low; (2) of the total of the rateable value of any parish being too high or too low, &c. The first part of the section having dealt with appeals founded on objections to the valuation list as it affects individuals, the second part deals with appeals in respect of total values. Then follows s. 33, upon which this rule has been obtained. Notice in writing of every appeal, whether to special sessions or the assessment sessions, specifying the correction which the appellant desires to have made in the valuation list, must be served on the following persons:—"in all cases on the surveyor of taxes of the district to which the appeal relates, and on the clerk of the assessment committee which approved the list wholly or partly questioned by the appeal:" and then come the material words we have to consider:—"when the appeal relates to the unfairness or incorrectness of the valuation . . . of an hereditament occupied by any person other than the appellant . . . then on such person." It was argued for the appellants that that clause refers only to appeals by individuals in respect of the value of particular hereditaments, to which the first part of s. 32 refers, and not to appeals in respect of totals, which are dealt with in the second part. Sect. 34 was relied on to support that view. By that section the mode in which justices in special sessions or in assessment sessions respectively are to hear appeals is pointed out. They "may confirm or alter the valuation list, so far as it is questioned by the appeal, in such manner as they shall think

just, but shall not make any alteration in contravention of this Act." It was said that the meaning of that provision is, that where the appeal is in respect of the valuation of a particular hereditament the justices may alter the valuation list by correcting the assessment of that hereditament, and when the appeal is in respect of totals they may alter the total values appearing in the valuation list, thus still preserving the distinction between the two classes of appeals.

It was contended that s. 41 also keeps the two classes distinct, by indicating the course to be taken with respect to giving notices of alterations made in the valuation list, in consequence of appeals to special sessions, assessment sessions, or a superior Court. Notice of alterations in the valuation list is to be sent to the overseers and surveyors of taxes of the parish, whilst notice of alterations of totals must be given to the clerk of the managers of the Metropolitan Asylum District. Upon an examination of all these different sections, I am of opinion that the appellants' argument is well founded. I think that the Act provides one set of rules applying where the appeal is by an individual in respect of the unfair or incorrect valuation of particular hereditaments within ss. 11 and 19, and another set of rules which apply where the appeal is in respect of the total values appearing in the valuation list. I think that the provision in s. 33 requiring notice of appeal to be given to the occupier of the hereditament applies to appeals under ss. 11 and 19, and not to appeals against totals. It was argued for the respondents that if the totals were altered without altering the assessment of particular hereditaments in the valuation list the absurd consequence would follow that the total value found to be correct by the assessment sessions would differ from the total values arrived at by adding up the particular assessments in the valuation list. But the result of increasing the total values leaving the particular assessments untouched would only be to increase the sum to be contributed by the parish and to compel the parish authorities to make higher rates. It may be that the legislature thought the inaccuracy referred to so unimportant that no special provision was made to correct it. However this may be I am of opinion that the intention of the legislature in s. 33 is perfectly

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plain. If the contention be right that, where the objection is to totals, notice of appeal must be served upon every occupier of a hereditament, whose assessment in the valuation list is objected to, the notices might have to be served upon some thousands of ratepayers with the object of bringing them before the court, and practically the matter could not be dealt with. Besides, if notice of appeal be served upon the occupier he need not come, nor is he bound to assist the court by furnishing materials on which to decide whether his assessment be correct or not. It is said that this appeal is within the very words of s. 33, because it is an appeal which "relates to the unfairness or incorrectness of the valuation of an hereditament occupied by a person other than the appellant." So in a sense it is, but not in the sense which the section intended. The subject matter of this appeal was not the valuation of each hereditament specified in the case, but the total values appearing in the valuation list. The intention of s. 33 was, in my opinion, to require that notice of appeal should be given to the occupiers of particular hereditaments only in cases of appeals by individuals under ss. 11 and 19. I am, therefore, of opinion that this rule should be discharged.

A. L. SMITH, J. I am of the same opinion. The question we have to decide turns entirely on the construction of s. 33. This is not an appeal by a ratepayer, or surveyor of taxes, but by parish against parish, the complaint of the appellants being that the rating of the respondent parish is too low. There are several classes of appeals provided by the Act. If a ratepayer or surveyor of taxes feels aggrieved by reason of the unfairness or incorrectness of the valuation of any hereditament, he may object in the first instance before the assessment committee. From the decision of the assessment committee he may appeal to special sessions, and from special sessions to the assessment sessions. But the appeal of one parish against the assessment of another parish must be to the general quinquennial assessment sessions, and the three grounds upon which the appeal may be brought are specified in s. 32. Those grounds are (1) that the total of the gross value of any parish is too high or too low; (2) that the total of the rateable value is too high or too low; and (3) that

there is no approved valuation list for some parish. Here the appellants seek to have the gross and rateable values of the respondent parish increased. Sect. 33 provides with respect to all appeals, that the notice of appeal shall specify the correction which the appellant desires to have made in the valuation list. Here the correction which the appellants desire to have made is with respect to the total gross and rateable values of the respondent parish. In my judgment that provision in s. 33 which the respondents rely on, does not apply to an appeal by parish against parish. It is said that, though the appellants' objection is only in respect of the total values appearing in the valuation list of the respondent parish, all the occupiers of the hereditaments specified in the case must be made respondents, and copies of the case served upon them under r. 5 of the Orders of 1870. It is true that as a matter of evidence the appellants before the assessment sessions have to say that the assessments of the particular hereditaments were too low, in order to get the total value appearing in the valuation list of the respondent parish increased. But what, as distinguished from the necessary evidence, is the subject matter of the appeal? The subject matter is the total values. That is the only matter upon which the appeal is grounded. I am of opinion that this appeal does not "relate to the unfairness or incorrectness of the valuation of an hereditament" within the true meaning of s. 33. The case stated here is only by way of giving particulars. It cannot be taken as a notice of appeal, because notices of appeal to the assessment sessions must be given, under s. 42, sub-s. 12, on the 14th of January, whereas the case under r. 5 must be delivered on or before the 1st of February. I am of opinion that this rule should be discharged.

Rule discharged.

Solicitors for appellants: *Nye, Greenwood & Morton.*
Solicitors for respondents: *Pontifex, Hewitt & Pitt.*

W. A.

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May 14.

[IN THE COURT OF APPEAL.]

DAVIES *v.* REES.

Bill of Sale—Deviation from Statutory Form—Extent of Avoidance—Covenant for Payment of Principal and Interest—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 8, 9.

Sect. 9 of the Bills of Sale Act, 1882, in avoiding a bill of sale which is not made in accordance with the form in the schedule to the Act, avoids it in toto —not merely as regards the personal chattels comprised in it—so that a covenant contained in it for the payment by the grantee of the principal and interest thereby secured is rendered void as against him.

Appeal by the defendant from the judgment of Stephen, J., on the further consideration of the action after the trial.

The plaintiff by a bill of sale assigned to Usher the chattels described in a schedule to the deed, by way of security for the payment of the sum of 100*l.*, and interest thereon at the rate of 58 per cent., payable monthly. And the plaintiff further agreed that he would pay to the grantee the principal, with the interest then due, by equal monthly payments of 10*l.* each.

On the 19th of March, 1884, the grantee made to the plaintiff a further advance of 50*l.*, on the conditions of the bill of sale.

On the 14th of July, 1884, the grantee in consideration of 170*l.* (which was recited to be then due to him on the security of the bill of sale) paid to him by the defendant, assigned the debt and the benefit of the bill of sale to the defendant. Notice in writing of the assignment was afterwards duly given to the plaintiff. The action was for damages for an alleged wrongful seizure and conversion by the defendant of some of the chattels comprised in the bill of sale, on the ground that the bill of sale was void under the provisions of the Bills of Sale Act, 1882.

The defendant by his defence relied on the title conferred on him by the bill of sale, and the assignment to him, and also counter-claimed for the balance due to him in respect of the loan, with interest at 58 per cent.

At the trial before Stephen, J., the jury found that the value of the articles sold by the defendant was 135*l.* Upon further

consideration, Stephen, J., held that the bill of sale was void under the Bills of Sale Act, 1882, and that, therefore, the covenant for payment of interest at 58 per cent. was also void. He held, accordingly, that the plaintiff was entitled to the 135*l.* damages, and that the defendant was entitled to recover on his counter-claim the 150*l.*, as money lent, with interest at 5 per cent. And he gave judgment for the defendant for 15*l.*, with interest on 150*l.*, at 5 per cent., from the 27th of November, 1883, to the 2nd of January, 1885 (the date of the seizure by the defendant), and interest, at 5 per cent, on 15*l.* from the 2nd of January to the 12th of December, 1885.

The defendant appealed.

Glascodine (*B. F. Williams, Q.C.*, with him), for the appellant. The covenant for payment of interest at 58 per cent. is not void. An agreement which is made void, either at common law as being contrary to the policy of the law, or expressly by statute, is only to be avoided so far as is necessary to carry out the object of the avoidance. If the agreement can be separated into two or more independent parts, only that part which is illegal will be void, and the validity of the remainder will not be affected, even if the words "null and void to all intents and purposes" are used in the statute. If it is impossible to separate the agreement into independent parts, then of course the whole will be void if there is any illegality: *Kerrison* v. *Cole* (1); *Biddell* v. *Leeder* (2); *Price* v. *Green* (3); *Gaskell* v. *King* (4); *Fuller* v. *Abbott* (5); *Pickering* v. *Ilfracombe Ry. Co.* (6); *Payne* v. *Mayor, &c., of Brecon.* (7)

The object of the Bills of Sale Act of 1882 is only to make void as securities bills of sale which do not comply with its provisions. The covenant for the payment of the mortgage money and interest is wholly independent of the bill of sale, and its validity is unaffected by the avoidance of the instrument as a security upon goods and chattels. The difference between the language

(1) 8 East, 231.
(2) 1 B. & C. 327.
(3) 16 M. & W. 346.
(4) 11 East, 165.
(5) 4 Taunt. 105.
(6) Law Rep. 3 C. P. 235.
(7) 3 H. & N. 572.

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of s. 8 and that of s. 9 (1); s. 8 using the words "shall be void in respect of the personal chattels comprised therein," and s. 9 using the expression "shall be void," is not sufficient to shew that s. 9 was intended to have a more rigorous operation than s. 8. A covenant for the payment of principal and interest is no part of the bill of sale properly so called; it is a separate and independent stipulation.

W. D. Benson, for the plaintiff. *Kerrison* v. *Cole* (2) is distinguishable from the present case. The language of the statute there in question was different from that of the Bills of Sale Act of 1882.

[He was stopped by the Court.]

LORD ESHER, M.R. On the construction of the Act of 1882 I think we must hold that this bill of sale is not "in accordance with" the form given in the schedule to the Act, subject to the interpretation which we gave to those words in *Ex parte Stanford* (3), and that therefore the deed, and the whole of it, is void under s. 9. The statute was passed with reference to bills of sale, and the very first bill of sale which one would expect to be within it is that a form of which is set forth in the schedule. Sect. 9 says that a bill of sale given as security for money shall be void unless made in accordance with the form in the schedule. The form of bill of sale given in the schedule contains a covenant by the

(1) Sect. 4: "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

Sect. 8: "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England, then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

Sect. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule to this Act annexed."

(2) 8 East, 231.

(3) 17 Q. B. D. 259.

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grantor to pay the principal sum lent, with interest, and therefore it seems to me impossible to say that a covenant to pay the mortgage money and interest is not part of the bill of sale which is spoken of in the Act. It may be that a covenant to pay principal and interest is not part of a bill of sale of which you can say that it is only an assurance of personal chattels. But I think it is impossible to say that a covenant which is to be found in that form which the Act prescribes is not part of the bill of sale with which the Act deals. It is argued that, when s. 9 provides that a bill of sale which is not in accordance with the scheduled form is to be "void," it means that it is to be void only to a certain extent. But I think the general rule of construction applies, that, if in one part of an Act the extent to which a transaction is made void is expressly limited, and in another part no limitation is expressed, you must conclude that in that part in which no limitation is mentioned the avoidance is meant to be without any limitation. Now, independently of s. 4, s. 8 shews that, when the legislature desired to limit the operation of the word "void," they did so by adding the words "in respect of the personal chattels comprised therein." That would leave the rest of the bill of sale valid. But s. 9 simply says that the bill of sale "shall be void," without any limitation whatever. It seems to me that the words must be taken in their natural meaning, viz., void to all intents and purposes, and that the whole of the instrument is to be void. The decision of the learned judge was therefore right. Notice of the assignment of the debt to the defendant was given to the plaintiff, and there was a good equitable assignment of the debt. There was an implied agreement to repay the money lent, independently of the bill of sale. It was not intended by the Act that the borrower should be able to keep the money which he had borrowed in his pocket because the bill of sale was made void.

BOWEN, L.J. I am of the same opinion. It is a pure question of the construction of the Act. With regard to the general principle nothing is clearer than that, under the apparent form of a single agreement or covenant, written on one piece of paper and sealed with one seal, you may have several independent con-

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tracts or obligations, and in such a case we must take care that the fall of one of those covenants or obligations does not drag the others with it. When an Act makes one thing void we must see that we do not destroy independent obligations merely because they are contained on the same piece of paper, or because, apparently, they hang together. That is the general principle. But here the question is, whether, according to its true construction, the Act of 1882 avoids only the bill of sale proper, or whether with it all the rest of the instrument is to go by the board. It may be said that the covenant to repay the principal money with interest is entirely independent of the assignment of the chattels, and that, if it had been contained in a separate piece of paper it would have been enforced, although the bill of sale was void, and that the fact that it is contained in the same piece of paper can make no difference. But, looking at the Act, and reading s. 9 by the light of s. 8, it appears that, when, by s. 8, the legislature intended to avoid a bill of sale only in respect of the personal chattels comprised in it, they have said so. In the very next section, s. 9, which directs that the form of bill of sale given in the schedule is to be followed, those words which limit the extent of the avoidance are absent, and it seems to follow that it was intended to make void the whole of a bill of sale which is not made in accordance with the form in the schedule. I have come, therefore, to the conclusion that this bill of sale is void in toto, though not without some doubt, because, looking at the mode in which this Act is drawn, I am not sure that it would not be doing too much honour to the draftsman to suppose that, when he was drawing s. 9 he remembered s. 8. On the whole, however, I think that he did.

FRY, L.J. The Act is one upon the true construction of which it is very difficult to form an opinion, but on the whole I agree with the conclusion of my Brethren. The question is, whether s. 9 avoids only the assignment of chattels contained in a bill of sale which is not made in accordance with the scheduled form, or whether it also avoids the covenant for payment of interest which is contained in the same piece of paper. Primâ facie I should have thought that the bill of sale which was intended to be made

void was only the assignment of the chattels. But s. 9 refers to a form of bill of sale given in the schedule to the Act as that which is to be followed, and in that form there is contained a covenant for the payment of principal and interest, and it seems to me to follow clearly that, for the purpose of s. 9, we are bound to conclude that a bill of sale is an instrument of which a covenant for the payment of principal and interest forms an integral part. That section avoids a bill of sale which is not made in accordance with the form in the schedule, and it must be understood as meaning a bill of sale which contains a covenant to pay the principal money and interest thereon. That construction of s. 9 is strongly confirmed by s. 8, because in that section the avoidance is limited to the personal chattels comprised in the bill of sale. If the term "bill of sale" was of itself limited to an assignment of personal chattels, it would have been unnecessary to introduce that express limitation into s. 8.

Appeal dismissed.

Solicitors for plaintiff: *Smith & Lawrence, for Smith, Lawrence, & Smith, Swansea.*

Solicitors for defendant: *Thomas White & Sons, for G. J. L. Morgan, Swansea.*

W. L. C.

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July, 7, 8.

THOMAS *v.* QUARTERMAINE.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1—*Defect in Condition of Ways or Plant.*

The plaintiff was employed in a cooling-room in the defendant's brewery. In this room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim rising sixteen inches above the level of the passage but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling vat and was scalded.

In an action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42):—

Held, that the plaintiff could not recover, for there was no evidence that he had been injured by reason of any defect in the condition of the ways, works, or plant of the brewery, within the meaning of the Act.

Appeal by motion from the decision of the judge of the County Court of Surrey.

The plaintiff, who was employed in the brewery of the defendant, sought to recover damages under the Employers' Liability Act, 1880, for injuries received from a fall into a cooling vat, on the ground that the defendant had been negligent in not fencing in the vat.

It appeared that a boiling vat and a cooling vat were placed in the same room in the defendant's brewery. A passage, which was in one part only three feet wide, ran between these two vats, the rim of the cooling vat rising sixteen inches above the passage. The plaintiff, who was employed in this room, went along this passage, in order to get from under the boiling vat a board which was used as a lid. As this lid stuck, the plaintiff gave an extra pull, when it came away suddenly, and the plaintiff, falling back into the cooling vat, was severely scalded.

There was no rail or fence to the cooling vat, and evidence was given by the defendant to shew that it was not usual to fence cooling vats, though it was proved that at one large brewery the cooling vats are fenced.

The judge gave judgment for the plaintiff, with 75*l.* damages, holding that there was evidence of a defect in the condition of the works at the defendant's brewery in there being no sufficient

fence to the cooling vat, and finding that the plaintiff had not been guilty of contributory negligence.

The defendant appealed.

W. Graham, and *Hewitt*, for the defendant. There was no evidence of any defect in the condition of the ways, works, or plant of the brewery, and therefore the provisions of 43 & 44 Vict. c. 42, do not apply to this case. There was no evidence of any negligence on the part of the defendant, and the defect, if defect there were, was obvious and known to the plaintiff, so that he voluntarily exposed himself to a danger of which he was fully aware, and the defendant is not liable: *Woodley* v. *Metropolitan District Ry. Co.* (1); *Lax* v. *Corporation of Darlington*. (2) There was no duty on the defendant to do anything which he has left undone: *Indermaur* v. *Dames* (3); *Griffiths* v. *Dudley*. (4) *Weblin* v. *Ballard* (5) is not an authority against the defendant, for that judgment proceeded on the ground that the apparatus was unfit for the purpose for which it was applied, so that the rule adopted in *Heske* v. *Samuelson* (6) and *Cripps* v. *Judge* (7) applied. [They cited *Brooks* v. *Courtney* (8).]

If a stranger had come to mend the boiler and had fallen into the vat he could not have maintained an action, and the plaintiff can be in no better position. The Employers' Liability Act has not raised the standard of the employer's duty; it has only deprived him in an action by the workman of certain common law defences.

Crump, *Q.C.*, and *Hodson*, for the plaintiff. The defendant is liable, there was no contributory negligence on the part of the plaintiff, and the premises were defective. The vat ought to have been fenced, the passage was too narrow, there was in fact what amounted to a trap. *Woodley* v. *Metropolitan District Railway Co.* (1) does not apply to a case under the Employers' Liability Act, nor does the maxim volenti non fit injuria. The rule in *Cripps* v. *Judge* (7) is applicable to the facts of this case. [They cited *Holmes* v. *Clarke* (9).]

(1) 2 Ex. D. 384.
(2) 5 Ex. D. 28.
(3) Law Rep. 2 C. P. 311.
(4) 9 Q. B. D. 357.
(5) 17 Q. B. D. 122.
(6) 12 Q. B. D. 30.
(7) 13 Q. B. D. 583.
(8) 20 L. T. 440.
(9) 7 H. & N. 937; 31 L. J. (Ex.) 356.

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WILLS, J. I am of opinion that this appeal must be allowed, and that the defendant is entitled to have judgment entered for him.

I will inquire first what our decision ought to be if there were no such statute in force as the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and then I will proceed to consider the effect of that statute upon this case. Apart from that statute the plaintiff could not, in my opinion, maintain this action. I take as one element in this case the fact found by the county court judge that there was no contributory negligence on the part of the plaintiff; but nevertheless the evidence discloses a state of facts which I consider would disentitle him from recovering without the aid of the statute, for it appears that if any danger did arise from the arrangement of this brewery, and the relative position of the two vats or of the cooling vat and the plank, that danger was known to the plaintiff, and that he, knowing the risk that he ran, yet voluntarily did that which resulted in the injury for which he now claims compensation. The danger, if danger there were, was certainly patent, and the plaintiff must have been no less aware of it than was any one else connected with the brewery. This being so, the well-known principle which is embodied in the maxim volenti non fit injuria applies, and the plaintiff cannot recover.

There were in the same room at this brewery a boiling vat and a cooling vat; between them ran a passage which was in part only three feet wide, the cooling vat had a rim rising sixteen inches high above the level of the passage, but it was not protected by any rail or fence. Under the boiling vat there was a receptacle wherein lay a plank or board which served as a lid. The plaintiff went to get this lid, he pulled it, but as it stuck he pulled harder, when it came away, as he stated, all at once, and he fell back into the cooling vat and was scalded. The accident therefore did not arise from the narrowness of the passage considered as a passage or gangway, but only because there was not width in it to enable a person meeting with such an accident to fall at full length across it.

Even supposing there were any risk arising from the passage being narrow, that risk was one which the plaintiff could under-

stand as well as any one else could, nor could the employer know, nor ought he to know, anything more about either the nature or extent of the risk than the plaintiff himself.

Out of many cases to which reference may be made, *Woodley* v. *Metropolitan District Ry. Co.* (1) and *Britton* v. *Great Western Cotton Co.* (2), recognise in clear terms the principle that a person who continues in an employment with full knowledge of the risk run, and who voluntarily goes to do that which he knows will expose him to danger, cannot recover for injuries so received, and the reason of this principle is expressed both powerfully and tersely by Lord Bramwell in a memorandum written by him on the case of *Clayards* v. *Dethick* (3) and printed in the Appendix B to Smith on Negligence. Lord Bramwell there points out that in such a case the accident is not due to the defendant's negligence but to the voluntary act of the plaintiff.

I now proceed to consider whether the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), has made any difference, and whether the provisions of s. 1, sub-s. 1, apply to this case. By that section the workman is entitled to the same right of compensation and remedies against the employer as if he had not been a workman—in case he receives personal injury caused "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer." That is there must be such a defect due to the negligence of the employer or those for whose negligence he would be responsible to a stranger. But I can see no evidence of any defect in the condition of either ways or plant. The way, as a passage or gangway, was safe enough, and, as far as appears, wide enough for any legitimate use that it could be put to as a way. There was no defect in the vat as a vessel to hold liquor to be cooled. The defect, if defect there were, was not in the way, considered as a way, nor in the vat considered as a vat, but in the proximity of the vat to the place where a piece of board was kept, which piece of board stuck by some accident when required for use. Now the test whether machinery or plant be defective or not within the meaning of the statute, laid down in the case of

(1) 2 Ex. D. 384. (2) Law Rep. 7 Ex. 130.
(3) 12 Q. B. 439.

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Heske v. *Samuelson* (1), and adopted by the Court of Appeal in *Cripps* v. *Judge* (2), was whether the machine was fit or unfit for the purpose for which it was applied. The same test must of course apply to a "way," and following that test I am of opinion that there was in this case no defect within the meaning of s. 1, sub-s. 1 of the statute, and therefore that this case is not brought within the provisions of the Employers' Liability Act, 1880.

It appears to me that the decision in this case must turn on the question whether the statute applies to this case. If I am wrong in holding that it does not apply to this case at all, then I think that *Weblin* v. *Ballard* (3) is an authority which governs the present case, for that decision binds us, and it seems to me to be an authority conclusive for the plaintiff, if the statute in question applies at all.

In that case the judges held that there was evidence "that the ladder (being without hooks or stays), used as it was upon the crooked pipe, was not in a proper condition for the purpose for which it was used, and that therefore there was evidence of a defect in the condition of the ways or plant." And again, it was there said "the use of the ladder appeared by the evidence to have been so manifestly dangerous that every one who saw the ladder so used must have been aware of the danger. This it was argued by the defendant proved that the deceased had been guilty of contributory negligence. We do not agree."

The learned judges therefore in that case took a view of the meaning of the clause at the end of s. 1, which enacts that a workman "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer," which will place him in certain cases in a better position than a person not in the service of the employer. Such a person, in the circumstances found in the judgment in that case, fully alive to the danger he was running, certainly could not have recovered, though asked by the employer to do the work. But they held that in such cases the defence that the servant has contracted to take upon himself the known risks attending the engagement is, by the statute, taken away

(1) 12 Q. B. D. 30. (2) 13 Q. B. D. 583.
(3) 17 Q. B. D. 122.

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from an employer when sued by a workman under the Act. In the case of a servant this is probably equivalent to saying that the defence that he knew of the danger is taken away, and it seems to have been so treated in that case. Speaking for myself it seems to me that this really does place the servant, not in the same position as a stranger, but in a better position. It is very difficult at all times to apply a hypothesis which is contrary to the fact. Is the hypothetical person, not in the service of the employer, to be treated as a person lawfully engaged in the operation in question, or unlawfully there; as a person doing the operation at the request of the employer or as a volunteer? These are questions which suggest only samples of the difficulty of applying an incomplete hypothesis to a state of facts which really negatives the hypothesis. Without, therefore, expressing any doubt as to the correctness of the decision in *Weblin* v. *Ballard* (1), I should have desired, had it been necessary, carefully to consider whether the fact that the defendant in such cases can no longer set up the defence that the plaintiff contracted to take the risks of the service, also precludes him from setting up that in the particular operation which in the particular case caused the injury, the plaintiff, treating him as not a servant, must yet have perfectly appreciated the danger of what he was going to do. This is not stated in terms in *Weblin* v. *Ballard* (1), but it certainly seems involved in the decision, and it is difficult to see how any such distinction as I have referred to, and which was pressed upon us in the argument, can be maintained. The result certainly seems to place the workman in a better position than a stranger, and, in his case, to deprive the employer of the benefit of the maxim, volenti non fit injuria. My ground, therefore, in this case for holding that the defendant is not liable is that, in my opinion, the facts of this case do not bring it within the statute, and that, therefore, the provisions of 43 & 44 Vict. c. 42, do not apply to it at all.

GRANTHAM, J. I also am of opinion that this case is not within the Employers' Liability Act, 1880. That Act enacts, I think, in effect that a servant shall be in the same position as a

(1) 17 Q. B. D. 122.

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stranger. Could a stranger have recovered in this action? The authorities are all unanimous to the effect that he could not. Reliance was placed by the plaintiff on *Weblin* v. *Ballard* (1), but that case is not an authority in his favour, for the judges decided it on the ground that the ladder was not in a proper condition for the purpose for which it was used, so that there was evidence of a defect in the condition of the ways or plant, whereas in this case there was no such evidence. The way was, as a way, perfect, and the vat was, as a vat, perfect, and therefore the section of 43 & 44 Vict. c. 42, on which reliance has been placed, does not apply to this case.

I agree with my Brother Wills, in the view which he has expressed as to the construction of the statute on which the judgment in *Weblin* v. *Ballard* (1) is based, and I think that the learned judges having found that the ladder was in itself dangerous, their judgment does not cover this case. In *Heske* v. *Samuelson* (2) the lift was also in itself dangerous, so that in both those cases there was a defect within the meaning of the Act, which we do not find exists in this case.

Judgment for the defendant. Leave to appeal granted.

Solicitor for plaintiff: *Summerhays.*

Solicitor for defendant: *Wansey, Bowen, & Co.*

(1) 17 Q. B. D. 122. (2) 12 Q. B. D. 30.

R. B. R.

JONES *v.* THE SCOTTISH ACCIDENT INSURANCE COMPANY, LIMITED.

1886
July 2.

Practice—Leave to issue Writ for Service out of the Jurisdiction—Company with Registered Office in Scotland—Action for Breach of Contract—Companies Clauses Act (8 & 9 *Vict. c.* 16), *s.* 135—*Order XI., r.* 1 (*c*) *and* (*e*).

An insurance company, whose registered office was in Scotland, and whose secretary resided there, but which also had agencies and a chief office within the jurisdiction of the High Court, issued a policy through an agent within the jurisdiction, to whom the premiums were paid. The company having refused to pay a claim on the policy:—

Held, that it was not domiciled or ordinarily resident within the jurisdiction, and that leave to issue a writ for service out of the jurisdiction could not be granted.

ACTION by plaintiff as executrix of her husband on a policy of insurance against accidents effected by the latter with the defendants. The defendants have their head office in Edinburgh, and their secretary resides there; but they have numerous branch offices and agencies throughout England, with a chief office for England in London. The insurance in question was effected by the plaintiff's husband with an agent of the defendants in Liverpool, and the premium paid to him. An application having been made ex parte at chambers to Day, J., for leave to issue a writ for service out of the jurisdiction, leave was refused on the ground that the defendant company was not ordinarily resident within the jurisdiction.

The plaintiff appealed.

H. Tindal Atkinson, for the plaintiff. The defendants are domiciled or ordinarily resident within the jurisdiction. The mere fact that their registered office is in Edinburgh does not affect the jurisdiction of the English Courts, for they carry on business in England by their various agents, and a corporation "dwells" at the place where its business is carried on: *Taylor* v. *Crowland Gas Co.* (1) The more recent case of *Keynsham Blue Lias Lime Co.* v. *Barker* (2) decides that a company incorporated for the manufacture and sale of goods carries on its business at

(1) 11 Ex. 1. (2) 2 H. & C. 729

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the place of manufacture and sale and not at its registered office. The defendants are not "ordinarily resident" in Scotland so as to oust the jurisdiction of the English Courts under Order XI., r. 1 (*e*), but are to be considered as ordinarily resident within the jurisdiction; for their agents make contracts for them within the jurisdiction, and they have a head office within the jurisdiction, which deals with the claims arising out of such contracts. (1)

POLLOCK, B. I am of opinion that the decision of Day, J., was correct. There is, it is true, a difficulty in applying the terms of the rules to every business carried on by a company; but the question is not new, and was fully considered after the coming into operation of the County Court Acts. The first principle arrived at in the early decisions was that a corporation dwells in the place where it carries on its business. The question then arose, where does a corporation carry on business? and the ordinary guiding rule for the answer to that inquiry is that it carries on business in the place where its chief office is situate. The head office may be an office where nothing is done beyond the holding of the general meeting; but it is reasonably interpreted in *Keynsham Blue Lias Lime Co.* v. *Barker* (2), as the place where the business of a company is done, and the company was there held to carry on its business in the place where its works were situate. The words used in this rule are "domiciled or ordinarily resident," and those words and similar words in previous rules have given rise to many legal decisions, and to a jealous feeling in Scotland as to the jurisdiction of the English Courts. If we decide that the head office is the place where the company is domiciled or resident, it is clear that we decide upon the same principle as the previous cases. If, on the other hand, we hold that a company is domiciled where it has an agent for local

(1) By Order XI., r. 1, service out of the jurisdiction of a writ of summons may be allowed whenever—(*c*) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; (*e*) when the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.

(2) 2 H. & C. 729.

business, we should come to the absurd conclusion that it is domiciled in every town in England, Scotland, and Ireland, where it has an agency. I cannot think that a reasonable conclusion to come to.

CAVE, J. I am of the same opinion. The language of Order XI. does not expressly apply to companies, but the analogy of the practice with regard to individuals is against the present application. In the case of a man residing and carrying on business in Scotland, but having branch establishments in England, it is clear that leave would not be given to issue a writ for service out of the jurisdiction; it would be absurd to say that he was ordinarily resident in England because he had a branch establishment there; and a plaintiff in such a case would be unable to bring himself within sub-s. (*c*) of Order XI., r. 1. If that is the way in which the Courts have dealt with the case of an individual, why should they not deal in the same way with that of a company? An individual carrying on business in Scotland with branches in England is resident at the place where he carries on his business; why should we adopt a different rule for a company? Legislation has gone on that footing, and the old Companies Act (8 & 9 Vict. c. 16, s. 135), provides that service shall be effected at the principal office of the company, or at one of the principal offices if there be more than one, or personally upon the secretary. The principal office is there regarded as the place where the company carries on its business, and putting together the enactment and the decisions it follows that in the case of a company service must be effected either at its principal place of business or upon its secretary, and that neither the company nor its secretary can be said to be resident in England when the company's principal place of business is in Edinburgh, and the secretary resides there.

Application refused.

Solicitors for plaintiff: *Bower, Cotton, & Bower, for Pride & Dodgson, Liverpool.*

W. J. B.

1886
July 13, 14.

THE QUEEN (ON THE PROSECUTION OF THE NATIONAL LIBERAL LAND COMPANY, LIMITED) *v.* THE INHABITANTS OF THE COUNTY OF SOUTHAMPTON.

Bridge—County, Liability of, to repair—Bridge not built in existing Highway—Acquiescence by County, necessary—County of a Town—Roadway over Bridge and Approaches—Highway Authority—Statute of Bridges (22 *Hen.* 8, *c.* 5)—*Highway Act*, 1835 (5 *& 6 Wm.* 4, *c.* 50), *s.* 21.

The owners of land on one side of a river made a road across such land and built a bridge connecting such road with an existing highway on the other side of the river. They then dedicated both bridge and road simultaneously to the public, who afterwards used the same :—

Held, that, the bridge not having been erected in an existing highway, the county was not liable for its repair, inasmuch as there was no evidence of acquiescence by the county in the building and dedication of the bridge.

The effect of the 21st section of the Highway Act, 1835, is, in the case of county bridges built subsequently to that Act, to throw the liability in respect of surface repairs to the roadway of the bridge and approaches upon the highway authority.

Where a county of a town has been created by charter and declared to be a separate county, the county in which it was originally situated is not liable for the repair of bridges within its boundaries.

CROSS motions for a new trial of an indictment against the inhabitants of the county of Southampton for non-repair of a bridge and the approaches thereto.

The first count of the indictment was for non-repair of a certain common public bridge known as Cobden Bridge, situate and being with the approaches thereto, for the space of 300 feet from either end thereof, in the parish of South Stoneham, in the county of Southampton, in the Queen's common highway leading from the town of Southampton and from the hamlet of St. Denys in the said parish, to Westend and Bitterne in the said county.

The second count was for non-repair of the approaches to the said bridge at either end of the same.

The third count of the indictment charged non-repair of one-half of the bridge, that is to say, from the centre of the River Itchin eastwards.

The fourth count of the indictment charged non-repair of the eastern approach to the said bridge.

At the trial which took place before Stephen, J., at the Bristol

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Winter Assizes, 1886, the facts proved, so far as material to this report, were as follows:—

The prosecutors, who were an incorporated land company, had made a road, called Cobden Avenue, across a building estate belonging to them on the east side of the River Itchin, in the county of Southampton, commonly called Hampshire, and had built a bridge across the river called Cobden Bridge, by which such road was connected with an existing highway on the west side leading from the town of Southampton to a landing stage on the river, which is public and navigable. They then dedicated both the bridge and the new road simultaneously to the use of the public by means of a public ceremony, at which the chairman of the company declared them open. It appeared that the bridge had been constructed to the satisfaction of the county surveyor, and that the public had extensively used the bridge and the road since the dedication.

It was proved at the trial that the western half of the bridge was in the county of the town of Southampton, of which the middle line of the River Itchin was the boundary where the bridge crossed it.

The county of the town was created by charter of 25 Hen 6, it having previously formed part of the county of Southampton. The charter, after reciting that the corporation of the town of Southampton had complained that the inhabitants of the town, and merchants, sailors, and mariners resorting thereto were taken, arrested, imprisoned, and in many ways disquieted by the sheriffs of the county and their bailiffs, granted to the corporation of Southampton that the said town and the port and precinct of the same should be one entire county corporate, in fact and in name distinct and separate from the county of Southampton for ever, and that the same should be called the county of the town of Southampton, and that the corporation should have in the aforesaid town a sheriff, to be elected by them in the manner specified by the charter. It further provided for the execution of process within the county of the town by such sheriff, and that no sheriff or bailiff, or servant of any sheriff, other than such sheriff, should enter into the said town, port, or precinct, or do or execute anything pertaining to his office therein, or in any

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way interfere in the same. The various liberties and franchises of the borough of Southampton, including the grant of the status of a county corporate, were confirmed or regranted by letters patent of Charles II.

It was stated in evidence by the town clerk of Southampton that there were not any bridges within the county of the town repairable by the corporation. But the county surveyor of Hants stated that the county only repaired the eastern half of another bridge called Four Posts Bridge, which was half in and half out of the county of the town of Southampton. The roadway of the approaches to and the footway over the Cobden Bridge were proved to be out of repair, the former being full of ruts and the tar paving of the latter wanting new facing. The ironwork of the bridge needed repainting to prevent the effects of rust. It was contended for the defendants that the western half of the bridge and the western approach thereto, being in the county of the town of Southampton, which was made a separate county by the charter, the defendants were not liable for the repair thereof. The learned judge being of opinion that their contention was correct directed a verdict of acquittal on the first and second counts.

It was further contended for the defendants that, this bridge not having been built in an existing highway, there was no evidence of acquiescence by the county in its building and dedication, and that therefore the county was not liable to repair it; and that the defendants were not liable in respect of repairs to the mere surface of the roadway over the bridge and eastern approach, the 21st section of the Highway Act, 1835, throwing the liability in respect of such repairs upon the parish. The learned judge ruled in favour of the latter contention, and therefore directed a verdict for the defendants on the fourth count. But he left the case to the jury on the third count and a verdict of guilty was found upon that count.

A rule nisi for a new trial was obtained on behalf of the defendants on the ground (among others) (1) that there was no

(1) Other points arose in the case besides those here reported. But, inasmuch as it became in the event unnecessary that the Court should decide these points, the facts with regard to them are omitted.

evidence that the bridge in question was a "bridge broken in a highway" within the meaning of the Statute of Bridges, 22 Hen. 8, c. 5. A cross rule nisi for a new trial was obtained on behalf of the Crown on the ground that the judge misdirected the jury with regard to the construction which he put upon the charter of Henry VI., and by not leaving to them the question whether as a fact the county of the town of Southampton was a bridge-repairing county or town: and also on the ground that he misdirected the jury on the construction of s. 21 of the Highway Act, 1835.

Bucknill, Q.C., and *A. Glen* (*Pitt Lewis, Q.C.*, with them), for the Crown. The county is responsible for the repair of this bridge both at common law and under the Statute of Bridges, 22 Hen. 8, c. 5, which was declaratory of the common law. That Act declares that in the case of "bridges broken in the highways" the inhabitants of the shire shall be liable for the repair subject to certain exceptions which do not apply here. This liability of the county has been held to extend to all "public" bridges except where the legal obligation to repair can be shewn to rest on some other person or body: *Rex* v. *Ecclesfield.* (1)

The test is whether the bridge is one of public utility, and by the terms of the Act it must be situated in a highway. This bridge is a bridge broken in a highway. It was out of repair, and it was in a public highway. It connects a highway on the western side of the river Itchin with the highway dedicated by the prosecutors on the eastern side: *Rex* v. *West Riding of Yorkshire* (2); *Rex* v. *Glamorgan* (3); and *Rex* v. *Bucks.* (4) If acquiescence on the part of the public in the dedication of the bridge is necessary, that is sufficiently shewn by the fact that the public have used the bridge.

The learned judge misdirected the jury with regard to the effect of s. 21 of the Highway Act, 1835. The meaning of that section is that, where there is an existing highway going through a river or stream, as is often the case, and after the Act a bridge is built to carry the road over the river or stream, the parish or

(1) 1 B. & Ald. at p. 358.
(2) 2 East, 342.
(3) 2 East, 356.
(4) 12 East, 192.

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other body, which was liable to repair the highway before the bridge was built, shall remain liable to repair the part of it that is carried over the bridge. It was not meant to relieve the county of their obligation in a case like this. If the section is construed as the learned judge construed it, no meaning can be given to the words "said highways."

Thirdly, the county is responsible for the repair of the whole of the bridge. The area comprised by the charter of Henry VI., which created the county of the town, was prior to such charter included in the county of Southampton. This charter cannot have been intended to take such area out of the county of Southampton for all purposes and to create it a county of itself with all the incidents and liabilities of an ordinary county. If that had been the general effect of the charter, the special provisions as to the appointment of sheriffs would have been unnecessary. It is submitted that the effect was only to make it a county for certain special purposes, that is to say for purposes connected with the execution of process within it. It is not disputed that a county of a town may be liable for the repair of bridges by prescription, but this case was not put as one of prescription but as depending on the effect of the charter. The question was not left to the jury whether the county of the town was in fact a bridge-repairing county.

The word "shire" used in the Statute of Bridges includes only the old counties in the ordinary sense of the term, and does not include a county of a town created by charter; and a county of a town is therefore not responsible for the repair of bridges within it unless expressly made so by the charter: *Rex* v. *Norwich.* (1)

[They also cited *Rex* v. *Sir H. Spiller* (2) and *Reg.* v. *New Sarum.* (3)]

Charles, Q.C., Austin, and *Selater Booth,* for the defendants. The words "shire" and "county" as used in the Acts relating to bridges are convertible terms. In the older Acts the word "shire" is used, and in the later Acts the word "county." The effect of the charter is to create the county of the town of South-

(1) 1 Str. 177. (2) Sty. 108.

(3) 7 Q. B. 941.

ampton a separate and distinct county from the county of Southampton for all purposes, including the reparation of bridges: *Reg.* v. *Pearce.* (1) Therefore the defendants can be under no liability with regard to the western half of the bridge and the approach on the western side, and the verdict on the first and second counts is right.

Secondly, the defendants are not liable in respect of the repairs to the surface of the roadway over the bridge and the eastern approach. It is impossible to construe the 21st section of the Highway Act, 1835, literally, because there cannot be a previously existing liability to repair the highway over a bridge that did not previously exist, which is what the words construed literally import. But, construing the section reasonably, it is sufficiently clear that it is meant to provide that in the case of bridges thereafter erected the repair of the surface of the roadway over the bridge and the approaches shall be thrown upon the highway authority responsible for the repair of the highway of which it forms part, the county remaining responsible for the structure of the bridge and raised approaches if any. That being so, the verdict on the fourth count is right, and, if the defendants are liable at all on the third count, they are not liable in respect of the surface of the roadway or footway over the bridge.

Lastly, the defendants are not liable at all, and the verdict on the third count cannot stand. The authorities shew that both at common law and under the Statute of Bridges it is not sufficient, in order to make the county liable for the repair of a bridge, that the bridge dedicated should be of utility, and that the public have used it. There must be something to shew acquiescence by the inhabitants of the county in the dedication. See per Lord Ellenborough, C.J., and Bayley, J., in the cases of *Rex* v. *West Riding of Yorkshire* (2), *Rex* v. *Bucks* (3), and *Rex* v. *St. Benedict.* (4) In all the cases in which the county has been held liable, the bridge appears to have been built in the line of a previously existing public highway where there was a ferry or ford over the river; and it is pointed out by Lord Ellenborough and Bayley, J., that in such cases there is evidence of acqui-

(1) 5 Q. B. D. 386.
(2) 2 East, 342.
(3) 12 East, 192.
(4) 4 B. & Ald. 447.

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escence by the county, because, the building of the bridge being an obstruction of an existing highway, it might have been made the subject of an indictment. In the present case the bridge was not built in an existing highway, for the road on the eastern side of the river was only dedicated at the same time as the bridge. Therefore there was no power to indict the land company for obstructing a highway. They were within their rights in doing what they did. Where there is no power to take any step by way of objection, there cannot be said to be any acquiescence. The mere user of the bridge by some of the public is no evidence of acquiescence by the county in its dedication. It would be very unreasonable that the county should be made liable to repair any bridge which a private individual might chose to build and dedicate and some of the public might use, however little benefit it might be to the county in general or however expensive it might be to maintain.

[They also cited *Rex* v. *West Riding of Yorkshire.* (1)]

A. Glen, in reply. The evidence shewed that the highway on the western side of the river went down to a landing-place on the water's edge, and the River Itchin being a navigable river was itself a highway. It has been held that a cul de sac may be a highway, and that it is not essential that a highway should be a thoroughfare. Therefore it may be said that the bridge was built in the line of a highway.

WILLS, J. In this case an indictment has been preferred against the inhabitants of the county of Southampton, now commonly called Hampshire, for non-repair of a bridge over the river Itchin, under the following circumstances. In ancient times the county of Southampton included certain land on the west of the river which has since the charter granted in the reign of Henry VI. become the county corporate of the town of Southampton. The bridge in question crosses the river, one half of it being in the existing county of Southampton and the other half within the limits of the county of the town of Southampton. The indictment contains four counts. The first count charged non-repair of the whole bridge, the second count non-repair of

(1) 5 Burr. 2594.

both approaches thereto, the third count charged non-repair of the eastern half of the bridge, and the fourth count non-repair of the eastern approach thereto. A verdict of guilty was given on the third count, and a verdict of not guilty on the other counts.

The bridge in question was built by a limited company, the owners of land on the east of the river, which it was to their interest to connect by an easy approach with the town of Southampton. They built the bridge to the satisfaction of the county surveyor, as a matter of construction, made several new roads through their property leading to the bridge in one direction and to existing highways in the other, and built the bridge so as to communicate on the west with an existing highway leading from the town of Southampton to a landing-stage on the river, which is public and navigable. They dedicated the new roads on their property and the bridge on the same day as highways for the public. A rule nisi was obtained on behalf of the defendants to set aside the verdict of guilty on the third count and for a new trial. I propose to deal first with the question that arises upon this rule as being the most important question in the case. It was contended for the Crown, first, that the county was liable at common law for the repair of the eastern half of this bridge, having regard to the circumstances under which it was erected and dedicated to the public; and secondly, that the county was liable under the statute, 22 Hen. 8, c. 5. These two propositions, though closely connected, are not, I think, identical. It is necessary, therefore, in the first place to consider what the liability of a county with regard to bridges is at common law. It seems clear that one of the conditions precedent to any liability on the part of a county for the repair of a bridge is that the bridge should be of public utility. That condition, however, appears in the present case to be satisfied, and I understand that the jury so found. It was argued for the defendants that there is a further condition which must be fulfilled before the liability of the county arises: that it is not sufficient that the public should have used the bridge and so proved its utility, but that there must be something to shew acquiescence in the making and dedication of the bridge on the part of the county that is to be made liable for its

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repair. It was argued on the contrary by the counsel for the Crown that the mere use of the bridge by the public is sufficient to cast the burden of the repair of it upon the county. Undoubtedly, if this latter contention were correct, the liability of the county to repair bridges would be exactly analogous to that of the parish in respect of highways prior to the Highway Act of 1835, the mere use of a highway by the public having been before that Act sufficient to cast upon the parish the burden of repair. There is, however, a long series of authorities which have been brought before us and discussed in the course of the argument, and which all appear to me to lead to the conclusion that it is a condition precedent to the common law liability of a county to repair a bridge that there should have been acquiescence on the part of the county in the making and dedication of the bridge. That acquiescence in the making of the bridge as distinct from its mere user when made was necessary in the view of Lord Ellenborough and Bayley, J., seems to me clear from the passages cited to us from the cases of *Rex* v. *West Riding of Yorkshire* (1) and *Rex* v. *St. Benedict.* (2) What is quite as significant as any direct expression of opinion given by Lord Ellenborough is the manner in which he comments in the case of *Rex* v. *West Riding of Yorkshire* (3), upon the evidence in such cases of user by the public, as shewing that the bridge there in question was a public bridge which the county was bound to repair. The expressions he uses at p. 348 would, as it seems to me, be unintelligible, unless he were of opinion that acquiescence on the part of the public was necessary to establish the liability of the county. He speaks in more than one passage of the public "lying by," and instead of making objection using the bridge. It is difficult to see how there could be any lying by, if there were no possibility on the part of the public of objecting to the construction of the bridge. There could be no possibility of objecting, so far as I can see, unless the putting up of the bridge were a nuisance; and it could only be a nuisance if it were in the line of an existing highway, so that, during its construction and after its erection, it occupied space over which but for it the

(1) 2 East, 342, 348, 349, 350. (2) 4 B. & Ald. 447, 450.
(3) 2 East, 342.

public could have passed, as well as had the right to pass. If that were so, the evidence of acquiescence and of "lying by," as distinct from mere user, becomes intelligible, and it is obvious that such considerations cannot apply to a bridge built like the present upon the land over which and to which there was no right of passage on the part of the public. It appears to me, from the passages I refer to, perfectly clear that Lord Ellenborough was of opinion that the liability of the county depended in those cases upon the fact that the bridge constructed formed a link between two existing pieces of highway; and that he based such liability upon the necessary implication that arises in such a case of acquiescence on the part of the public because the building of such bridge must have interfered with a ferry or ford connecting such pieces of highway, and such interference would, therefore, have been ground, if objected to, for an indictment. In the case of *Rex* v. *St. Benedict* (1), Bayley, J., treats it as settled law that the county is not liable except for bridges made in highways, and says that the reason is that the making of the bridge, and thereby obstructing the highway while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, and the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge. It is true that the expression of opinion so given is open to the observation that the actual decision in the case, which was that a parish is not liable for the repair of a highway unless it has acquiesced in its dedication, was afterwards overruled; but it is in accordance with the views expressed by Lord Ellenborough, and the decisions to which I will presently advert upon the statute of Henry VIII., as to the necessity for a bridge, to come under that Act, being in the line of an existing highway; and the reasoning upon which such decisions are founded seems to be intelligible only upon such a view of the common law. The authorities appear to have been carefully investigated and fully brought before us by the counsel on both sides, and I assume that our attention has been called to all the material decisions, but no instance has been cited where an indictment has been successfully brought against a county for the non-repair of a bridge

(1) 4 B. & Ald. 447.

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constructed by a private individual, except where such bridge stood in the line of a highway as used before the bridge was built. In all the cases brought before us there appears to have previously been a ferry or a ford in the line of the highway before and at the time when the bridge was built. It seems to me to be a matter of great importance to maintain this protection for the benefit of the county. The statute 43 Geo. 3, c. 59, s. 5, which limited the liability of counties in respect of new bridges to cases where the county surveyor was satisfied that the bridge was erected in a substantial and commodious manner, does not contain any provisions analogous to that of the 23rd section of 5 & 6 Wm. 4, c. 50, by which, in the case of a parish, a vestry meeting must be summoned to determine as to the utility of a new road. I cannot help thinking that the fact that the legislature, when making this provision for the protection of the county in respect of the structure of the bridge, did not insert any such provision requiring an express adoption by the county authorities, and that no such provision is to be found in the General Highway Act (in which some provisions as to bridges are to be found), is a strong indication that such a protection was unnecessary because the repair of a new bridge could not be thrown on the county without evidence of acquiescence in its dedication. It has been suggested that, wherever a bridge is of public utility and has been used by the public, such user is in itself evidence of such acquiescence. I do not think that is so. There can be no evidence of assent unless there was some power of interfering. Where a man builds a bridge on his own land and not in the line of any existing highway, nor so as to interfere with any existing highway, and dedicates it to the public, neither the public in general nor the county has any means of expressing any dissatisfaction; the mere fact that many of the public are glad to use the bridge is no evidence of acquiescence by the county in the sense in which I have defined it. We are not called upon to say how the acquiescence of the county can in such a case be proved. In most cases, if the bridge be really one of great public utility, there will be no difficulty in coming before dedication to an understanding with the county authorities. But, however that may be, it is enough at present to say that acquiescence must at

any rate be proved in some other way than by the mere fact of user by the public.

I wish to point out that in some of the passages, to which I have referred, acquiescence by the public is spoken of, in others acquiescence by the county. It matters little which expression is used in those passages, which all refer to acquiescence by failure to indict, and such acquiescence on the part of the public must always include that on the part of the county. If acquiescence at all be necessary, it must, I think, be acquiescence on the part of the county, upon whom the liability falls. Such a view is in harmony with the legislation effected in regard to parochial liability for the repair of new highways by the General Highway Act. It is thoroughly intelligible as regards the evidence of acquiescence afforded by non-indictment, for the county can, through the justices, always indict. There is certainly nothing unreasonable in holding that a liability of the serious nature in question cannot be thrown upon the county by the mere act of an individual, which the county is as powerless to prevent as it is to interfere with any one who chooses to make use of the bridge when dedicated.

I now come to the question which, though of a cognate nature with that already discussed, is, I think, a distinct one, viz., whether there is any liability thrown on the county to repair this bridge by the statute 22 Hen. 8, c. 5. This statute, which is in somewhat archaic language, provides for the remedy of "all manner of annoyances of bridges broken in the highways to the damage of the King's liege people," meaning thereby, I think, bridges in a highway and out of repair. The language to which I have before alluded, as used by Lord Ellenborough, appears to have reference as well to the liability of the county under the statute as to liability at common law, and clearly shews that he considered that a bridge, in order to be within the statute, must be a bridge built in the line of an existing highway. The same observation applies to the case of *Rex* v. *Inhabitants of Bucks.* (1) See per Lord Ellenborough at p. 198 as well as the judgment in extenso. In the cases of *Rex* v. *Inhabitants of Kent* (2) and *Reg.* v. *Inhabitants of Ely* (3), and, I believe, in every case that can be

(1) 12 East, 192. (2) 2 M. & S. 513. (3) 15 Q. B. 827.

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found in the books of a successful indictment in the case of a new bridge, it has been built in the line of an old highway and as a substitution for a ford or ferry. It is true that this is not insisted upon in the decision in *Rex* v. *Kent* (1), but it was the fact, and the large expressions in the judgment, which may seem to conflict with the views I have expressed as to the common law liability, must be understood with reference to the question in controversy in the case and the facts which were relevant. I cannot think that Lord Ellenborough meant to depart from a view which was clearly a settled one in his mind, and it is to be observed that it was shewn in the elaborate judgment in *Reg.* v. *Ely* (2) that there are strong reasons for doubting the authority of the decision in *Rex* v. *Kent.* (1)

A bridge built to establish a connection between a highway on one side of a river and a new road dedicated at the same time as the bridge on the other side does not come within the category of "bridges in highways," within the statute of Henry VIII., and is not open to the same considerations as those which affect a bridge built in an existing highway. The land company had a right to do what they pleased with their own land in the exercise of their lawful rights as proprietors, and the county had no power to interfere with what they so did.

We are assured by counsel on both sides that the statute of Henry VIII. is declaratory of the common law liability. If so, it would certainly be to deprive the inhabitants of the county of a very necessary protection, to which I think they would have been entitled at common law, if we were to hold that the county is to be rendered liable to repair by the mere facts of such dedication on the part of the company and user by the public of the approaches to the bridge as well as of the bridge itself. It appears to me that this is a strong reason for reading the statute of Henry VIII. as referring only to the case of bridges erected in existing highways, and not to such a case as this. I think, also, that some indication of what the framers of the Highway Act of 1835 supposed to be the meaning of the statute 22 Hen. 8, is given by the 21st section of that Act. The language of that section is not very intelligible, and it is not easy to reconcile all the expressions used in it. It

(1) 2 M. & S. 513. (2) 15 Q. B. 827.

is impossible to construe it literally, because so construed it provides that in the case of bridges thereafter to be built the highways leading to, passing over, and adjoining to such bridges, shall be repaired by the parish, person, or body who were by law, before the erection of the said bridge, bound to repair the said highways, which is an absurd provision if construed literally, because, the bridge not having previously existed, there could not previously have been a highway leading to or passing over it, and so no person could have been bound to repair such highway. A bridge, however, built in the line of an old highway must have an old highway or old highways leading to and next adjoining it, whereas a bridge like the present, dedicated simultaneously with the highways leading to and next adjoining to it, has nothing about it to which the section can be made applicable; and, if the section be regarded as based upon the idea, consistent as it is with the interpretation already put upon the statute of Henry VIII., that a new bridge to be repairable by the county must be in the line of an old highway, the legislation is consistent and harmonious enough, though the language may not be very happily chosen, and not nearly so much violence is done to the language as would be necessary to make it applicable to the case of a new bridge with new roads leading to it. That section, therefore, seems to me strongly to support the view that the statute of Henry VIII. is to be construed as applying only to the case of a bridge erected in the line of an ancient highway. For these reasons it appears to me that the contention of the defendants with regard to the construction of the statute 22 Hen. 8, c. 5, is correct. If, as we are told, there is authority for the view that the statute of Henry VIII. was declaratory of the common law, the expressions which have been used by the judges with regard to the statutory liability of the county are applicable to and illustrative of the common law liability. I put this proposition hypothetically, because the statement in Burn's Justice of the Peace to that effect refers to 2 Inst. 700 as the authority, and there is certainly nothing in the passage so referred to which warrants the statement. I am of opinion, therefore, that the defendants' rule for a new trial must be made absolute.

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Then there is the cross rule obtained on behalf of the Crown to be disposed of. It was argued on behalf of the Crown that there should be a new trial on the ground that the judge misdirected the jury on the construction of the charter by which the county corporate of the town of Southampton was created, and in not leaving to the jury the question whether the county of the town was a bridge-repairing county, and also on the ground that the judge misdirected the jury as to the effect of the 21st section of the Highway Act, 1835. The construction which, as I understand, the judge put on the charter was that it constituted the county corporate of the town a county with all the ordinary incidents and liabilities of a county, one of which was the liability to repair its own bridges. He therefore held that, as the middle line of the river was the boundary between the county and the county of the town, the county of the town and not the county was bound to repair the western half of the bridge. That appears to me to be the correct view of the effect of the charter, and I cannot conceive on what principle it can be contended that the county of the town was not by the charter constituted a county with all the liabilities of such as to bridges and other matters. It was argued that, because the charter made specific provision for the appointment of sheriffs, therefore the intention could not be that all the ordinary incidents of a county should attach to the county corporate, for if they did, then the special provisions as to sheriffs would be unnecessary. I do not think that the insertion of clauses of this kind, probably inserted e majori cautela, and to prevent all possibility of disputes with regard to offices, the emoluments of which in those days were undoubtedly considerable, gives rise to any such implication as that suggested. It was said that a county of a town or city is not in this respect under the same liability as an original county. I cannot understand why. Certainly the case of *Rex* v. *Norwich* (1) which was cited is no authority for that proposition, but, on the contrary, is, as far as it goes, an authority against it. There the area of a city, which was a county of itself, had been enlarged by an Act of Parliament, and the question was whether a bridge in the added area was repairable by the county of the city or continued

(1) 1 Str. 177.

repairable by the county out of which the additional area was taken. The indictment in that case was framed upon the ordinary common law liability of a county and nothing else, and no suggestion was made either in the argument or in the judgment that a county of a town or city was not liable for the repair of bridges like an ordinary county.

Then, with regard to the alleged misdirection as to the effect of s. 21 of the Highway Act, 1835, it is necessary to express our opinion as to that point, because it bears upon the fourth count which relates to the eastern approach. The section provides that "if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of a county, then and in such case all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road who were by law, before the erection of the said bridge, bound to repair the said highways, provided nevertheless that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge or the land arches thereof."

It is said that the effect of the section is that the approach to the bridge must be repaired by the county as well as the bridge itself. I do not think that to be the true construction. It seems to me clear that the intention of the section taken as a whole was that the artificial parts of the structure, viz., the stonework and ironwork, etc., of the bridge, and the earthwork of the raised banks of the approaches, other than the mere surface skin, as well as the walls or fences thereof, should be maintained by the county, but that the approaches themselves (in the sense of the roadways leading to the bridge) and the roadway over it should be maintained by the authority responsible for the repair of the contiguous highways—that is to say, by the parish or other highway authority in the case of the particular highway of which the bridge forms part. I am therefore of opinion that the county was not responsible for the repair of the roadway of the eastern approach to the bridge. For these reasons I come to the conclu-

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sion that the verdict of not guilty on the first, second, and fourth counts was correct, and that the rule obtained on behalf of the Crown must be discharged.

GRANTHAM, J. I am of the same opinion. The case is one of considerable importance, and I am glad that after a full examination of the authorities the view which I was inclined to take at the commencement of the argument turns out to be correct; because, if the argument for the prosecution were correct, a greater liability might, I think, be thrown on the inhabitants of a county than they ought to be called upon to sustain; for it would be in the power of private individuals, who might often be speculators endeavouring to enhance the value of their own land, to build and dedicate bridges for their own ends, and so throw the expense of maintaining such bridges upon the inhabitants of the county, who might often not obtain any commensurate benefit. The points that arise in the case are three in number. One question is whether that portion of the old shire or county of Southampton, which was constituted the county of the town of Southampton by the charter of Henry VI. is liable to maintain its own bridges or entitled to have them maintained by the county of Southampton. I do not think it necessary to say more with regard to that point than that I agree with my learned Brother's view, and that it appears to me quite impossible to argue that, merely because the word "shire" is used in the Statute of Bridges (22 Hen. 8, c. 5), the county of the town created by the charter of Henry VI. is not liable for the repair of bridges. If that argument were correct it would seem to follow that every bridge in a county of a town would be repairable by the county at large. Another question raised was as to the construction of the 21st section of the Highway Act, 1835. I agree with my brother Wills that the effect of that section is to limit the liability of the county to the repair of the substantial structure of the bridge and approaches, and throw upon the parish or other highway authority the liability to repair the mere roadway. At the time when the statute of Henry VIII. was passed there was not the same opportunity for repairing roads as now exists, and at that time it was very likely thought that the builders of bridges might content

themselves with building the bridges and not make the approaches safe or convenient, and the parish might neglect to do so, and therefore it was deemed necessary to provide that some such public body as the county should maintain the approaches. But the state of things had become very much altered when the Highway Act of 1835 was passed, and I cannot see what reasonable construction can be given to s. 21, unless it was meant to throw the liability of repairing the roadway on the parish or other body responsible for the highways, leaving the liability to maintain the structure on the county.

With regard to the third question, viz., as to the liability of the county to repair the eastern half of the bridge, and the effect of the 22nd Hen. 8, c. 5, I am on the whole of opinion that the words "bridges broken in the highways" in the statute refer to bridges built and dedicated in existing highways. It seems to me clear from the authorities cited when closely examined that the idea running through all the expressions used by the judges in those cases was that it was not sufficient to show that a bridge was useful and that it had been used by the public unless it was made in a highway and was in that sense accepted by the county. For these reasons I think that the rule obtained by the defendants must be made absolute, and that obtained on behalf of the Crown discharged.

Rules made absolute and discharged accordingly.

Solicitor for the prosecution: *F. A. A. Rowland.*

Solicitor for the defendant: *H. Sowton* for *T. B. Woodham*, Winchester.

E. L.

Considered. *In re* McArdle, Decd. [1951] 1 Ch. 669

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July 13, 15.

HARDING *v.* HARDING and Another.

Practice—Chose in Action—Assignment—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The defendants, who were executors and trustees under a will, sent to G., one of the residuary legatees, a statement of account shewing a balance to be due to him on account of his share of the residuary estate. G., who lived in Australia, sent this account to his daughter, the plaintiff, with the following direction on it in his handwriting: "I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shewn in the above statement. . . ." Notice in writing of this document was given by the plaintiff to the defendants, but they refused to be bound by it:—

Held, that the document was a valid assignment of the balance in the hands of the defendants, and that the plaintiff was entitled to recover the amount.

Appeal from the judgment of the judge of the county court of Loughborough.

The facts were as follows:—

The defendants were the executors of James Harding, and one of the residuary legatees under James Harding's will was George Harding, the father of the plaintiff. George Harding lived in Australia, and the defendants, after realizing the estate, sent him an account headed, "Estate of the late James Harding, deceased, in account with George Harding," in which, after crediting him with his share of the estate and debiting him with sums of money paid to him on account, a balance of 28*l.* 19*s.* 3*d.* was shewn to be due to him from the estate. George Harding received the account, and on the 4th of September, 1884, wrote at the foot of it words which, so far as is material to the present case, were as follows: "I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shewn in the above statement, less the ten pounds received by me in Australia. George Harding, Sydney."

The account, with this writing at the foot of it, was sent home by George Harding to his daughter Laura, the plaintiff, who kept it for some time, but in the month of October, 1885, communicated it to the defendants. At that time George Harding could not be, nor has he since been, heard of, and the defendants

wrote two letters to the plaintiff's solicitors, the effect of which was that they would comply with the direction as to the payment of the money if they were satisfied that the plaintiff could give them a proper receipt. Eventually, however, they declined to pay her the money, and the plaintiff brought an action in the county court for the amount and recovered judgment. The defendants appealed.

Sills, for the defendants. This is not an assignment which would be enforced in equity; it is a voluntary alienation; and, in the absence of valuable consideration, specific performance of a contract or direction to transfer property will not be decreed: *Holroyd* v. *Marshall*. (1) The words used by the assignor must shew an intention of transferring or appropriating the chose in action to or for the use of the assignee for valuable consideration: White and Tudor's Leading Cases, pp. 767, 770 (5th ed.). Here there is nothing more than a gift of money, and that an invalid one; for it might have been recalled by George Harding at any moment. The plaintiff could clearly not have maintained this action but for the provisions of s. 25, sub-s. 6, of the Judicature Act, 1873; but that does not help her when rightly understood. That statute only provides that where there is an assignment, the assignee may sue in his own name; it does not make any alteration in the law as to what is an assignment, or say that something is an assignment which would not have been one before the passing of the Act. To constitute a legal assignment there must be a consideration for it, although the consideration need not be expressed in the document; here there is none.

Toller, for the plaintiff. The defendants as trustees of residuary estate under a will have given an account of the estate to the beneficiary and could have been sued by him for the amount on an account stated: *Hart* v. *Minors*. (2) They can also be sued by the plaintiff as assignee of the amount, for the direction of George Harding is a good assignment both in equity and at law. It is a good equitable assignment; for it is not merely an order to a debtor to pay a sum of money to a third person, but it also specifies the fund or debt out of which the payment is to be

(1) 10 H. L. C. 191; 33 L. J. (Ch.) 193. (2) 2 Cr. & M. 700.

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made: *Brice* v. *Bannister* (1); *Percival* v. *Dunn* (2); *Lambe* v. *Orton.* (3)

It is a good legal assignment under s. 25, sub-s. 6, of the Judicature Act, 1873; the debt was a legal chose in action belonging to George Harding; it was absolutely assigned by him to the plaintiff by a document in writing, and express notice in writing of the assignment has been given by the plaintiff to the defendants. [He also cited *Kekewich* v. *Manning.* (4)]

Sills, in reply.

WILLS, J. I am of opinion that the decision of the county court judge was right. It was argued for the defendants that this was a mere equitable assignment, and that having been made in favour of a volunteer without consideration, equity would not enforce it. But I think that a misapprehension of the rules of Courts of Equity is involved in that proposition. The rule in equity comes to this; that so long as a transaction rests in expression of intention only, and something remains to be done by the donor to give complete effect to his intention, it remains uncompleted, and a Court of Equity will not enforce what the donor is under no obligation to fulfil. But when the transaction is completed, and the donor has created a trust in favour of the object of his bounty, equity will interfere to enforce it. The reason why equity will not interfere in favour of a mere volunteer, but requires a valuable consideration for the transaction, is that in such a case there is nothing wrong in the donor changing his mind and withholding from the object of his liberality the contemplated benefit. But if there is value given on the one side in exchange for the donor's intention, then there is a contract, or something approaching to a contract, between the parties, and the donor cannot withdraw from his expressed intention. We were much pressed with the authority of *Holroyd* v. *Marshall* (5), but we think that the doctrine there laid down does not apply to a case like the present. In that case the goods which were the subject of the transaction were things capable

(1) 3 Q. B. D. 569.
(2) 29 Ch. D. 128.
(3) 1 Dr. & Sm. 125.
(4) 1 De G. M. & G. 176.
(5) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

of being conveyed by a legal title, things as to which the grantor was competent to do something further to complete the legal title of the grantee; and it was held that he was bound to do so, as he had had consideration. When, however, the subject-matter of the transaction is an equitable right or estate, and a legal title cannot be given; then if the settlor has done all in his power and nothing remains to be done by him, equity regards it as though he had completed the legal title, and gives effect to his intention.

In the present case it was proposed to assign a sum of money due from the trustees, the defendants; and probably before the Judicature Act it would have been impossible to give a legal title to Laura Harding, so as to enable her to sue in her own name in respect of this right of action; she could have maintained a suit in equity, but the legal title could not have been completed in her. Now it can be done; and it seems to me that the legal title has been so completed by the notice signed by George Harding and sent by him to the plaintiff. If it is to be regarded as an equitable assignment, he has done all that he could to make it complete; if, as a legal assignment, he has completed it; and under s. 25, sub-s. 6 of the Judicature Act, 1873, the assignee of a chose in action may sue in his own name, the law as to the necessity for a consideration not applying, as it seems to me, if the assignment is completely made. If the assignment had been made by deed, the question of consideration could not arise; and in my opinion the question of want of consideration has no application to such a case as the present. But there is a further fact in the present case; George Harding authorized his daughter to communicate his letter to the trustees; she did so, and the trustees assented to the assignment. It seems to me that that fact carries us a step further, and imports into the case another doctrine of equity; that under such circumstances the assignee is regarded as the cestui que trust of the debtor, if the debtor has assented to the obligation. The correspondence shews that the trustees assented to take the plaintiff as their cestui que trust, and the facts ought to have satisfied them that she had the power to give them a proper receipt. The authority given by George Harding to receive the

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money was unrevoked, and the plaintiff was competent to give an effectual discharge. I think that even without the assent of the trustees there was a good and valid assignment to the plaintiff; but with such assent arises the second doctrine that I have referred to, which settles any possible question as to her right to maintain this action.

It is further objected that the action cannot be maintained against the defendants personally, but should have been brought against them as executors; that objection I think untenable. The defendants had stated an account acknowledging the debt, and there is ample authority for saying that they can be sued in their personal capacity.

GRANTHAM, J. I am of the same opinion. Looking at the facts of the case I think the assignment was enforceable both at law and in equity. The fallacy which underlies the argument for the defendants is that this is a mere voluntary assignment, not enforceable legally or equitably. But looking at the authorities in equity, I think it is unnecessary that in every case an assignment should be made for valuable consideration; that is clear upon an examination of the judgment of Lord Eldon in *Ex parte Pye* (1). On the question whether or not the assignment was completed it is only necessary to refer to *Meek* v. *Kettlewell* (2), where Wigram, V.-C., says: "If the equitable owner of property, the legal interest of which was in a trustee, should execute a voluntary assignment of the property, and authorize the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the dividends or interest of the trust property to the assignee during the life of the assignor and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity."

In the present case there were no dividends to pay to the assignee, but the defendants did all that they could do towards recognising the assignment as being good in equity.

I think the facts shew that they have accepted the trust; and

(1) 18 Ves. 140. (2) 1 Hare, 464.

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I have no doubt that Laura Harding could give a valid receipt for the money. That, however, was in my opinion unnecessary to complete her title; everything has been done necessary to make a voluntary assignment a completed act, and a Court of Law, as well as a Court of Equity, will complete the assignment. I concur in the judgment of my brother Wills.

Appeal dismissed.

Solicitor for plaintiff: *Hood Barrs*, for *Gee*, Leicester.

Solicitors for defendants: *Field, Roscoe, Field, Francis, & Osbaldeston*, for *Deane & Hands*, Loughborough.

W. J. B.

[IN THE COURT OF APPEAL.] *April 6.*

THE QUEEN *v.* ESSEX.

Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 63—*Part of Building Estate taken for Sewage Farm—Value of other Parts thereby depreciated—Compensation for "injuriously affecting" same.*

Part of land laid out as a building estate was taken by a local board under an Act incorporating the Lands Clauses Act (8 & 9 Vict. c. 18), for the purposes of a sewage farm, whereby the value of other parts of the land was depreciated: these other parts were situate near to the part so taken, but separated from it by intervening land belonging to other owners:—

Held (reversing the judgment of the Queen's Bench Division), that the owner of the building estate was not entitled to compensation under the Lands Clauses Act, 1845, s. 63, for damage sustained by reason of "injuriously affecting" the parts of the land other than that which was taken by the exercise of the statutory powers.

In re Stockport, Timperley, and Altringham Ry. Co. (33 L. J. (Q. B.) 251) distinguished and commented on.

APPEAL by the Acton Local Board against a judgment of the Queen's Bench Division discharging a rule nisi for a certiorari. (1)

The rule called on T. C. C. Essex to shew cause why a certiorari should not issue to bring up an inquisition, verdict, and judgment, taken before the sheriff of Middlesex, touching the claim made by Essex for the purchase by the Acton Local Board of his interest in certain lands, and also for damage by

(1) 14 Q. B. D. 753.

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reason of the injuriously affecting of his other lands by the exercise by the local board of their compulsory powers.

The claimant was owner in fee of land at Acton, which was laid out for building. Five acres of the land were taken by the Acton Local Board under statutory powers for the purposes of a sewage farm. The claimant took proceedings under the Lands Clauses Act, 1845, claiming compensation for his interest in the land taken, and also for the "injuriously affecting" of other parts of his land near, by the exercise of the statutory powers.

The claim was heard before the under-sheriff and a jury, when evidence was given that, even in the absence of any nuisance in fact arising from the sewage farm, there was a depreciation in the market value of other parts of the claimant's land,—one part separated from the land taken only by a railway; the other part close to, although not immediately adjoining, the land taken—by reason of the sewage works. The under-sheriff asked the jury what they would award to the claimant, first, for the five acres of land taken, and, secondly, for the damage done to the remainder of his property by the erection or proposed erection of the sewage works: the jury awarded 8737*l.* for the land taken, and 4000*l.* compensation for such damage, and judgment was given accordingly. The local board paid to the claimant the sum of 8737*l.*, but refused to pay to him the sum of 4000*l.*

The Queen's Bench Division held that the claimant was entitled to recover from the local board the sum of 4000*l.*, being the compensation awarded by the jury for the damage done to that part of the claimant's property which was not taken. (1)

April 5, 6. *Sir R. E. Webster, Q.C.*, and *Pollard*, for the local board. Injurious affection of neighbouring land by the user of the works is not matter for compensation: it must be proved that there is injury arising from their construction. Here there is no interference with the land alleged to be injuriously affected, no severance of it, no visible damage to it; in fact, there is no injury which would be actionable if the local board were acting without statutory powers. The question really is whether the *Stockport Case* (2) was rightly decided. That case cannot be reconciled with

(1) 14 Q. B. D. 753. (2) 33 L. J. (Q.B.) 251.

subsequent decisions. It seems to proceed on the assumption that what the Lands Clauses Act, 1845, did, was to legalise a trespass: but that is a misconception. Statutory power is given to carry on a certain business, and if this idea of an initial trespass is to be adopted, letting in a claim for compensation whenever any land of the claimant has been taken, it would have applied equally in *Hammersmith Ry. Co.* v. *Brand* (1), since there was a claim in that case for interference with a right, and there is no difference in effect between taking land and interfering with any other right. *Rex* v. *Pease* (2), and *Vaughan* v. *Taff Vale Ry. Co.* (3), are against the decision in the *Stockport Case.* (4) If the mere fact of some land of the claimant being taken is sufficient to support this claim, it would follow, that he would be entitled to compensation for all his land affected, however distant, while injury to land of other persons nearer to that taken would not be the subject of compensation. Further, the present claim, though stated as if it were for an immediate injury, is in fact a claim for anticipated damage from the user of the works, and, therefore, cannot be enforced: *Hammersmith Ry. Co.* v. *Brand* (1); *City of Glasgow Union Ry. Co.* v. *Hunter* (5); *Caledonian Ry. Co.* v. *Walker's Trustees.* (6)

C. H. Anderson, Q.C. (*E. Clarke, Q.C.*, with him), for the claimant. Apart from user, the mere knowledge, that sewage works are to be constructed, depreciates the land in the neighbourhood. In order that compensation may be claimed for injuriously affecting land, it need not be immediately adjacent or contiguous to the land taken: *Holt* v. *Gas Light and Coke Co.* (7) The decision in *Duke of Buccleuch* v. *Metropolitan Board of Works* (8) is in favour of the argument for the defendant; but the authority, upon which most reliance may be placed, is the *Stockport Case* (4), which has never been overruled.

Pollard, in reply. The decision in *Duke of Buccleuch* v. *Metropolitan Board of Works* (8) to some extent turned upon the Thames Embankment Act, 1862, and the construction of that statute is explained in *Macey* v. *Metropolitan Board of Works* (9).

(1) Law Rep. 4 H. L. 171.
(2) 4 B. & Ad. 30.
(3) 5 H. & N. 679.
(4) 33 L. J. (Q.B.) 251.
(5) Law Rep. 2 H. L., Sc. 78.
(6) 7 App. Cas. 259.
(7) Law Rep. 7 Q. B. 728.
(8) Law Rep. 5 H. L. 418.
(9) 33 L. J. (Ch.) 377.

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In order to entitle a claimant to obtain compensation for injuriously affecting his land, there must be a severance from it physically of the land taken: in order to enable the local board to succeed, it is not necessary to overrule the *Stockport Case* (1), for in that case there was an actual severance of the land taken from the land injuriously affected.

LORD ESHER, M.R. I suppose that nobody conversant with these cases can deny the extreme difficulty of them. I must say that I think that the difficulty arose, when the Courts put upon the meaning of those words "injuriously affected" a narrow construction. I confess that I follow the reasoning of Lord Westbury (2) when he said that it was that limited construction of the words, being other than a construction according to their ordinary meaning, which has raised all the difficulty in these cases. With regard to that construction we are bound by the decisions of the House of Lords, and therefore the words "injuriously affected" are not to be taken in their ordinary sense; it is only a peculiar injury which is an injurious affection within the meaning of the Lands Clauses Act. Certain acts done upon land not belonging to the claimant for compensation, although in truth and in fact they do injure the land which he has, and of which he is the owner, and do affect it in this sense, that they lessen its value, must be taken not to injuriously affect his land within the meaning of the statute. But in the *Stockport Case* (1) it has been held that if a part of the claimant's land has been taken, an act which otherwise would not be an injurious affecting of the particular land in respect of which he is claiming, becomes an injurious affecting of that land. It is said that the taking of the land does give him the right to compensation, because in respect of the land taken if there were no statutory powers, he might have maintained an action for trespass. It is true that he might have maintained an action of trespass, and it is true that the damages in respect of that trespass would vary according to the effect which that trespass would have upon the plaintiff, and

(1) 33 L. J. (Q.B.) 251.

(2) It is presumed that Lord Esher, M.R., was referring to the judgment of Lord Westbury in *Ricket* v. *Metropolitan Ry. Co.*, Law Rep. 2 H. L. 175, at pp. 202, 207.

he might in respect of that trespass no doubt obtain damages exceeding the mere value of the land taken or differing from the mere value of the land taken, and he might have damages, because the trespass would injure him in other respects, and because it might injure him in respect of his ownership of another part of the land. That is true. And if we are to consider that the compensation is to be in truth measured by the damages, which he might have recovered for that trespass if there had been no statutory powers, and for a trespass continuing as it were for ever, then I think it might be said that he would have a right to consider as part of those damages the continuing and perpetual injury, which would be done to other parts of the same property. I cannot think that the Lands Clauses Act makes the compensation to be a compensation measured by the damages, which he might recover in an action for a continuing trespass or a trespass which continues for ever. The compensation given under the Lands Clauses Act is based on this theory, that the claimant is selling his land to the persons who are to pay compensation, but he is to have more than he would have as a mere vendor, because he is a vendor compelled to sell. If he is treated as a vendor, I quite understand that an ordinary vendor in an ordinary dealing would require a larger price for some portions of his land than he would for other portions: as for instance, a man would not sell a part of a lawn or part of a garden close to his house for the same price as he would sell the same quantity of land on the other side of an intervening wood and situate a mile from his house. It is not a reasonable view that he would sell on the same terms: he would require a larger price. He would not sell the land and get compensation in respect of the injury done to his house separately, he would get more for the piece of land that he was selling; and I suppose that any tribunal would give him on a compulsory sale more for that land.

The *Stockport Case* (1) has been discussed again and again, and I agree that perhaps that judgment was in effect upheld in the *Duke of Buccleuch's Case* (2), and I have been reading the judgment delivered in that case in the Exchequer Chamber, which was written by Montague Smith, J. But the authorities had not

(1) 33 L. J. (Q.B.) 251. (2) Law Rep. 5 H. L. 418.

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then been sifted as they have been since, and when I come to consider the *Stockport Case* (1), it appears to my mind to raise this extraordinary proposition, that something to be done under an Act of Parliament by those who have to pay compensation, being necessary to the original object which they are to carry out, and not being the mere subsequent user of the land, if it is not done actually on the claimant's land, although it is done on the very border of his land, is to be taken as not injuriously affecting the claimant's land within the meaning of the Lands Clauses Act; but that if some few feet of the claimant's land are taken, the main body of his land is to be considered as injuriously affected. Suppose that the plot of land is one continuous piece of land, and that the works in respect of which the claimant is complaining are at one end of the land and do not touch it, and the promoters of the undertaking, for some reason or other which recommends itself to Parliament, should take a piece of the same plot at the other end: as, for instance, if they build gas works in front of the claimant's house, but not on his land, and take a piece at the further end of his plot of land behind his house and behind a wood: if the *Stockport Case* (1) is pushed to its logical conclusion, because they have taken the piece of land at the back of the house, that building which is in the front of the house, and which if they had not taken the piece at the further end would not injuriously affect the claimant, injuriously affects him within the meaning of the Act. I confess that that result startles my mind very much, and I cannot follow the reasoning which would lead to so strange a conclusion. Therefore I must confess that if I were part of a tribunal which could overrule the *Stockport Case* (1), I should be prepared to overrule it.

But suppose that we cannot overrule the *Stockport Case.* (1) It has been discussed several times, and certainly it is a case which, so far as I can make out, none of the Lords in the House of Lords who have ever discussed it, approved of, and none of them said it was right. It is one of those cases which, whenever it is discussed, comes to be considerably questioned. If that case is to be upheld, is it to be extended? I certainly think that the *Stockport*

(1) 33 L. J. (Q.B.) 251.

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Case (1) is not to be extended. In the *Stockport Case* (1) the ground of the judgment is, that if a piece of land is taken, that alters the rights of the owner and gives to him a claim for a larger compensation. But what was the land that was taken? It certainly was a portion of a continuous piece of land—not continuous in the sense of being held under the same title, for I cannot think that title has much bearing on this question—but it was land held as one unbroken portion of the earth's surface. In the *Stockport Case* (1) property of another person in which the claimant had no interest, did not intervene between the piece of land taken from him and the land in respect of which he was claiming compensation. Then the question arises, am I to extend the *Stockport Case* (1), strange as it seems to my mind as it stands, to this further strange conclusion, that if the promoters take a part of the claimant's land wholly separated from the land in respect of which he is making the claim, therefore his rights in respect to the land for which he is claiming are to be enlarged? If the *Stockport Case* (1) is carried as far as that, there is no doubt that although a large property intervenes between the piece of land taken and the piece of land alleged to be injuriously affected, and although it is injured much more than the land in respect of which compensation is claimed, and although the owners of it will get no compensation, yet because a diminutive piece of land of the claimant has been taken he will get a substantial sum in respect of the land alleged to be injuriously affected as upon its compulsory sale. I think that the *Stockport Case* (1) ought not to be extended, and at all events, this case is not governed by the *Stockport Case.* (1) In the present case, between the piece of land taken and the land in respect of which the compensation is now claimed a railway intervenes, which is wholly the property of the railway company, and in which the present claimant, the person seeking compensation, has no interest. There is complete separation. I think that that circumstance makes a valid distinction between this case and that. No other case but the *Stockport Case* (1) can be relied upon. In all the other cases the land taken, in respect of the taking of which the compensation or the larger compensa-

(1) 33 L. J. (Q.B.) 251.

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tion was given, was at all events a continuous part of the same land as that which was injuriously affected.

I do not advert to the phraseology of any section in the Act of Parliament; I am afraid to touch the statute. If I once take the language of the Act of Parliament, I think, with Lord Westbury, that the original decisions, as far as the interpretation of the language goes, are such that I cannot adopt them. Here I am hampered, not by the language of the Act of Parliament, but by the decisions on that language, which cannot now be controverted.

I put my judgment, therefore, in this case solely on this ground, that I think the *Stockport Case* (1)—and I say it advisedly now after having considered it by the light of all the comments on it—was wholly wrong. But if it is to be assumed to be a case which is not to be overruled, it certainly is not to be extended, and therefore it is not to be extended to this case, which has a material difference from it.

I think, therefore, that this appeal ought to be allowed.

Another point was taken, namely, that the injury done to the claimant would be occasioned by the subsequent user of the land taken by the local board, and that the present case falls within the principle of the decision in *Brand's Case*. (2) We all are of opinion that the injury done to the claimant would be occasioned by the construction of that which was authorized by the statutory powers of the local board, and, therefore, that our judgment must be founded exclusively upon the point which I have discussed at length.

The order of this Court will be, that the rule nisi will be made absolute as to the sum of 4000*l*., and the inquisition will be quashed as to that amount.

LINDLEY, L.J. The question raised in this case is one of considerable difficulty. Before making any observations on the cases and the Act of Parliament, it is well to consider the exact position of the claimant, Mr. Essex. The Local Board of Acton have taken under the powers of an Act of Parliament which incorporates the Lands Clauses Consolidation Act, a piece

(1) 33 L. J. (Q.B.) 251. (2) Law Rep. 4 H. L. 171.

of the claimant's land. That piece of land does not physically adjoin or abut upon other land of his. But he has other land close by; and his two pieces of land are severed, and were severed some years ago by the railway company. When the railway company severed these two pieces of land, they paid the proper compensation for the severance; and the compensation which they paid at that time, would include every injury which could be foreseen, and which could properly be taken into account. But the piece, which has been taken by the Acton Local Board, was let, as I understand, on a long lease, and Mr. Essex was the ground landlord; his interest in that piece of land was reversionary, and his beneficial interest was measured by the amount of the ground rents which he received. He was not in occupation of the surface, and he did not occupy or farm or use that piece in any sense together with the piece on the other side of the railway. They were not held together in any such sense as that. They may have been, and I suppose they were, held together under the same title. In that sense they may have been held together, but in no other sense. The Acton Local Board have taken one piece, and of course they must pay compensation for it, and the jury have assessed the sum of 8737*l.* as the value of this piece of land. As to that there is no controversy. But they have assessed also a further sum of 4000*l.* as due to the claimant in respect of the diminution of the value of the other land, and the real question, which we have to consider, is whether he is entitled to any compensation in respect of the diminution in value of that other land. Now he can only get compensation by relying on the sections in the Lands Clauses Act, and upon the numerous decisions which have put an interpretation upon those sections. If we look at the statute itself and look carefully at its words, it appears to me that he has great difficulty in bringing himself within those words so far as the point now in dispute is concerned. Of course he has no difficulty in bringing himself within the Act as regards the land taken; but when we look at the 49th section, we find that he is entitled under that section to compensation in respect of the land taken, and in addition to that the jury are to deliver their verdict separately "for the sum of money to be paid by way of compensation for the damage (if any), to be sustained by the owner of the

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lands, by reason of the severing of the lands taken from the other lands of such owner." Now as regards the land on the other side of the railway there is no severance, and the other lands of the owner are not lands from which anything has been taken or severed. He cannot get anything for that land on the other side of the railway. Then it runs on, "or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith." Now, what are the words, "and otherwise injuriously affecting such lands?" What lands? Those are the lands previously spoken of, the other lands of the owner, but they are the same lands as those therein spoken of, or, in other words, they are the lands of the owner from which some other land has been severed. I do not think that upon the true construction of s. 49 the claimant can claim this sum of 4000*l.*, there having been no severance.

Is there any decision under the Act which will entitle him to this sum of 4000*l.*? The case, and the only case, which he can rely upon, is the *Stockport Case*. (1) Now whether the *Stockport Case* (1) is, or is not law, I think, is very doubtful; I confess that I have great difficulty in following the reasoning in the *Stockport Case* (1) on the one side, and the great mass of cases on the other side which have not overruled it, but which are extremely difficult to reconcile with it in point of reasoning; but I will assume it is not overruled. The *Stockport Case* (1) never has been expressly or directly overruled. It has stood, therefore, more or less discussed, and more or less objected to, but, on the other hand, more or less approved of by learned judges for a good many years, and I assume that the *Stockport Case* (1) is now approved of. In the *Stockport Case* (1) the claim for compensation was within the exact words of the Lands Clauses Act. It was a case of severance. The land taken was severed from the larger portion of what had been the same piece or the same property thitherto held and enjoyed together. There was no physical separation between the two pieces of land which consequently were divided by the taking into distinct portions; that case, therefore, is substantially different from this. When it has been attempted, as it has been on former occasions, to stretch the *Stockport Case* (1), the attempt

(1) 33 L. J. (Q.B.) 251.

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has always failed. The whole controversy in cases, such as *City of Glasgow Union Railway Company* v. *Hunter* (1), turned on this, that it was an attempt by the claimant to invoke the aid of the *Stockport Case* (2) and to persuade the House of Lords to extend it. The House, however, declined to extend it at all, and threw a good deal of doubt on that case. We are now asked to extend the *Stockport Case* (2) to a case where there is no severance. It appears to me that we ought not to do that, inasmuch as the claimant does not come either within the exact language of the section if it is interpreted rightly, or within any decision which will carry him over the difficulty to which I have adverted.

As to the second point mentioned by the Master of the Rolls, I need only say that I agree with him, and that the depreciation of the land alleged to be injuriously affected was caused by the dedication of the land taken to the erection of the sewage works, and not by the intended subsequent user.

This appeal ought to be allowed.

LOPES, L.J. My learned Brothers have so fully dealt with the facts of this case, that I shall not allude to them. I shall merely state my reasons for thinking that the decision of the Court below was wrong.

The case is important, and raises to some extent a novel point, which is, whether a person whose land is taken under compulsory powers is entitled to compensation for other land of his which is depreciated in value by reason of the construction of the works, where there is no severence, and where another person's property is interposed between the land taken and the other land in respect of which compensation for depreciation is claimed. If such compensation were recoverable, it may be observed that a strange anomaly would arise, as has been pointed out by the Master of the Rolls, and that is this, that while the more distant property, which would be less depreciated, is to be held to be entitled to compensation, because it belongs to the same person to whom the land taken belongs, the nearer property, which is more depreciated, is to be entitled to nothing because it belongs to a person whose land is not taken. Now I do not think that

(1) Law Rep. 2 H. L., Sc. 78. (2) 33 L. J. (Q.B.) 251.

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the *Stockport Case* (1) nor the true construction of the sections of the Lands Clauses Act which apply to this case, compel us to arrive at such a conclusion.

First, with regard to the *Stockport Case* (1), which is the case on which reliance has been placed by the claimant's counsel. The *Stockport Case* (1) to my mind is clearly distinguishable from this case, and distinguishable on this ground, that in the *Stockport Case* (1) there was a severance, and in this case there is no severance. I think myself that that is a substantial ground for distinguishing the one case from the other, a ground of distinction which does not seem to have been dwelt upon, or, I may say, observed upon at all in the judgments of the Court below. I think, therefore, the *Stockport Case* (1) does not assist the contention of the claimant. I agree with what has been said; I think the doctrine of the *Stockport Case* (1) ought not to be extended.

According to my view, the contention for the claimant fails on the construction of the sections of the Lands Clauses Act which apply to this case. Take for instance s. 63: it appears to me that the compensation for injuriously affecting other land according to the true construction of that section only arises when the taken land is severed from the other land. I think s. 49 and the other sections in no wise militate against that view, but rather assist it.

That being so, the judgment of the Court below ought to be reversed and this appeal ought to be allowed.

As to the second point mentioned by the Master of the Rolls, I think that the injury was done by the construction of the works, and would not be caused by the subsequent user, and I agree with what he said.

Appeal allowed.

Solicitors for claimant: *Hedges & Brandreth.*
Solicitor for local board: *Alexander Hemsley.*

(1) 33 L. J. (Q. B.) 251.

J. E. H.

FURBER AND OTHERS *v.* COBB. 1886 *July* 22, 26.

Bill of Sale, Validity of—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Covenant necessary for Maintenance of the Security.*

A bill of sale by which household furniture was assigned by way of security for the payment of money contained a covenant by the grantor that he would not permit the chattels so assigned, or any part thereof, to be destroyed or injured or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear, and that, whenever any of the said chattels should be destroyed, injured, or deteriorated, he would forthwith replace, repair, and make good the same. The bill of sale provided that upon default in the performance of any of the covenants therein contained on the part of the grantor, all of which covenants were thereby declared to be necessary for the maintenance of the security thereby created, the grantees should have power to seize the goods without notice immediately or whenever they might think fit:—

Held, that the before mentioned covenant was not necessary for the maintenance of the security, and that the bill of sale was void by reason of the provisions of the Bills of Sale Act (1878) Amendment Act, 1882.

INTERPLEADER issue tried before Bowen, L.J., without a jury.

The facts were as follows:—The plaintiffs in the issue claimed certain goods, which had been taken in execution, under a bill of sale given by the execution debtor. The contention for the defendant, the execution creditor, was that the bill of sale was void by reason of the provisions of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form in the schedule to that Act.

By the bill of sale a large quantity of household furniture and effects specifically described in the schedule was assigned to the plaintiffs as security for the repayment of a sum of money to them by the grantor; and it was (among other clauses which it is not necessary to set out) provided as follows:—"The said mortgagor doth agree with the said mortgagees that he will not permit or suffer the said chattels and things, or any part thereof, to be destroyed or injured or to deteriorate subsequently to the execution of these presents in a greater degree than they would deteriorate by reasonable use and wear thereof, and will, whenever any of the said chattels and things are destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same."

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It was further provided that in case default should be made by the mortgagor in payment of the principal or interest, or "in the performance of any of the covenants hereinbefore contained on the part of the said mortgagor, all of which covenants are hereby declared and agreed to be necessary for the maintenance of the security hereby created," it should be lawful for the mortgagees after any such default without notice immediately or whenever they should think fit to seize and take possession of the said chattels and things, &c.

Pollard, and *Hodge*, for the plaintiffs.
H. Reed, for the defendant.

Cur. adv. vult.

July 26. BOWEN, L.J. The question which arises is as to the validity of a bill of sale. The bill of sale provides that the goods may be seized in the event of the non-performance of any of the covenants therein contained by the grantor, and among other covenants which I pass over there is a covenant by which the grantor agrees that he will not permit or suffer the chattels or things assigned or any part thereof to be destroyed or injured or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear thereof, and will, whenever any of the said chattels and things are destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same. By this bill of sale the grantor in effect agrees that not a single article out of a very large quantity of household furniture and effects shall be destroyed or deteriorated except so far as the same would deteriorate by reasonable use and wear, and that, if any such article is destroyed or deteriorated, he will forthwith replace it, and, if he fails to do so, all the goods assigned may be immediately seized. For instance, by way of illustrating the effect, the schedule mentions a number of vases. If one of such vases is thrown down by accident and broken and is not replaced, it follows that then immediately there is power to seize the whole of the goods included in the bill of sale. By virtue of what provision of the Bills of Sale Act (1878) Amendment Act, 1882, can it be argued that such a covenant can lawfully be converted into a condition on which seizure of the goods can

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take place? It could only be so on the footing that such a covenant was necessary for the maintenance of the security. The parties to this bill of sale thought that they could get over this difficulty by agreeing between themselves that all the covenants contained in the bill of sale shall be deemed to be necessary for the maintenance of the security, and inserting such agreement in the bill of sale. But I am clear that the parties cannot by such an agreement override or dispense with the provisions of the Act, and that they cannot make a covenant necessary for the maintenance of the security by agreeing that it shall be considered to be so. The question, therefore, must be whether such a covenant as this is really necessary for the maintenance of the security. I do not think that it needs many words to shew that a covenant so harsh and penal as I have shewn this to be cannot be necessary for the maintenance of the security; and therefore upon that ground the bill of sale appears to me to be invalid. I have been informed during the argument that this bill of sale has been treated as valid by judges in previous cases, but the recent case of *Ex parte Stanford, In re Barber* (1), must, in my opinion, be considered as in the nature of a new departure with respect to the law in these cases; and it appears to me impossible, having regard to the language used by the Court of Appeal in that case, to come to any other conclusion than that at which I have arrived. My judgment must therefore be for the defendant.

Judgment for the defendant.

Solicitor for plaintiffs: *Richard Furber.*
Solicitors for defendant: *Burgess & Cosens.*

(1) 17 Q. B. D. 259.

E. L.

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April 17.

[IN THE COURT OF APPEAL.]

MOORE *v.* THE LAMBETH WATERWORKS COMPANY.

Waterworks—Highway—Nuisance—Fire-plug—Wearing away of Road.

A fire-plug had been lawfully fixed in a highway by the defendants. Originally the top of the fire-plug had been level with the pavement of the highway, but in consequence of the ordinary wearing away of the highway the fire-plug projected half an inch above the level of the pavement. The fire-plug itself was in perfect repair. The plaintiff, whilst passing along the highway, fell over the fire-plug and was hurt:—

Held, that, as the fire-plug was in good repair, and had been lawfully fixed in the highway, no action by the plaintiff would lie against the defendants.

Kent v. *Worthing Local Board* (10 Q. B. D. 118) commented on.

ACTION to recover damages for bodily injuries.

The defendants were a waterworks company, and had been originally incorporated by 25 Geo. 3, c. lxxxix., amended and extended by 4 & 5 Wm. 4, c. vii. (1); both these statutes were repealed by s. 1 of 11 & 12 Vict. c. vii., and the defendants were re-established and re-incorporated as a company by s. 2, and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), was incorporated by s. 9. (2)

(1) Sect. 21 of 4 & 5 Wm. 4, c. vii., enacts that "The said company of proprietors" (the defendants,) "shall, and they are hereby required, upon the carrying into and laying down any main pipe in any highway, road, street, lane, passage, or place for the supplying the same with water, to fix and place, or cause to be fixed and placed, at the time of laying down such main pipe, one or more proper and sufficient fire-plug or fire-plugs in each highway, road, street, lane, passage, or place supplied with water from such main-pipe, for the supply of water for the extinguishing of fires."

(2) Sect. 38 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), enacts that "The undertakers, at the request of the town commissioners, shall fix proper fire-plugs in the main and other pipes belonging to them, at such convenient distances, not being more than the prescribed distance, or, if no distance be prescribed, not more than one hundred yards from each other, and at such places as may be most proper and convenient, for the supply of water for extinguishing any fire which may break out within the limits of the special Act."

Sect. 39: "The undertakers shall from time to time renew and keep in effective order every such fire-plug. . . ."

Sect. 40: "The cost of such fire-plugs, and the expense of fixing, placing, and maintaining the same in repair, shall be defrayed by the town commissioners."

Sect. 32 of the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90),

At the trial before Day, J., without a jury, it appeared that for many years the defendants had kept and maintained a plug in a footpath at Streatham, within the district of the Wandsworth Board of Works, constituted under the Metropolis Management Act, 1855. About the year 1880 the footpath was lowered, and a new plug was put down, and the footpath was then covered with asphalte so as to make it level with the box containing the plug. But in the course of time the asphalte became worn away by the traffic, so that the plug projected about half an inch above the level of the pavement. The plug itself was in perfect repair. The plug was intended to be used for extinguishing fires, and also for flushing the defendants' main-pipes. The defendants had one key to the plug, and the fire brigade had another. On the 14th of August, 1884, the plaintiff, while passing along the footpath, fell over the plug and suffered bodily injury. Day, J., was of opinion that *Kent* v. *Worthing Local Board* (1) was in point, and gave judgment for the plaintiff for 600*l*.

The defendants appealed.

April 10. *Winch*, (*Edward Clarke*, *Q.C.*, with him), for the defendants. At the trial Day, J., felt himself bound by the decision of the Queen's Bench Division in *Kent* v. *Worthing Local Board* (1), and this is really an appeal from the judgment in that case. It professed to proceed upon the authority of *Borough of Bathurst* v. *Macpherson* (2); but some misapprehension appears to have existed on the part of the judges in the Queen's Bench Division, for in the latter case the accident was caused by the defective state of a barrel drain which the defendants had constructed, and over which they had full control; while in *Kent* v. *Worthing Local Board* (1) the valve-cover itself was in good condition, and it was the roadway which needed repair.

enacts that "All the powers now exercised by any local body or officer within the metropolis as respects fire-plugs, shall henceforth be exercised by the Metropolitan Board of Works . . . and every such water company shall provide at the expense of the Board in any mains or pipes within the metropolis, plugs for the supply of water in case of fire at such places, of such dimensions, and in such form as the Board may require."

(1) 10 Q. B. D. 118.

(2) 4 App. Cas. 256.

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Bayley v. *Wolverhampton Waterworks Co.* (1) is not in point, for in that case the plug itself was out of repair; but in the present case the fire-plug itself was in good repair, and it was the defect in the pathway which caused the accident. The fire-plug was put down by the defendants lawfully: it was perhaps in the first instance fixed under the powers of the Act of the defendant company passed in 1834 (4 & 5 Wm. 4, c. vii. s. 21); but at all events it was lawfully put down and maintained under either the Waterworks Clauses Act, 1847, ss. 38, 39, or the Metropolitan Fire Brigade Act, 1865, s. 32.

Waddy, Q.C., and *Aspland*, for the plaintiff. It may be assumed on behalf of the defendants that they were entitled by law to fix the plug at the place in question; but they were guilty of negligence when they allowed it to project above the level of the pavement; by the Waterworks Clauses Act, 1847, s. 39, they were bound to keep the plug in repair, and if the pathway was out of repair, the plug can hardly be said to have been in good order, even although it cannot itself be said to have required repair.

As to the authorities which have been cited, *Bayley* v. *Wolverhampton Waterworks Co.* (1) was decided upon the clauses of a local Act, which substantially resembles ss. 38, 39, and 40 of the Waterworks Clauses Act, 1847: it is therefore a strong authority for the plaintiff. This Court cannot give judgment for the defendants without overruling *Kent* v. *Worthing Local Board* (2), which is directly in point.

Winch, in reply.

Cur. adv. vult.

April 17. The following judgments were delivered:—

LORD ESHER, M.R. This is a curious case. A fire-plug, or at all events, a plug, was put down in a highway; it was, so far as the evidence goes, put down with due care and was in proper condition in the highway. It remained there, and it must be taken that the plug itself was kept in perfect order and that there was no defect in it. But the plug being in the highway, the roadway was worn away, so that the roadway had got half an inch

(1) 6 H. & N. 241. (2) 10 Q. B. D. 118.

below the top of the plug. The plaintiff caught his foot against the plug and fell down, and then he brings this action against the waterworks company and obtains judgment for a considerable amount. The question is whether the waterworks company are under those circumstances liable. Now the argument for the plaintiff really amounted to this, that whoever puts into a highway that which becomes from any cause a nuisance or dangerous to persons going along the highway, is liable to make compensation if it occasions injury to any person. But, to my mind, that doctrine has always been applied only where a thing has been put without authority in the highway. If something is put without authority in the highway, that of itself does not make the person putting it there liable at the hands of an individual; an obstruction in the highway will not entitle an individual to bring an action. But if something is put in a highway without authority and is left there, so that it becomes that which is generally called a nuisance, but which is really an obstruction, and if a person, lawfully using the highway, falls over it, or is otherwise injured by it, the person putting it in the highway must make compensation. But the waterworks company were certainly authorized by Act of Parliament to put this plug in the highway. I infer that they were compelled to put it in the highway; because, although a great deal of argument was brought forward to shew that this was not a fire-plug, to my mind it is clear as a matter of fact that it was a fire-plug, whether it was originally put there as a fire-plug or not; and I think the evidence clear that the plug must have been originally put there as a fire-plug. Besides being used as a fire-plug, it was no doubt used by the waterworks company as that which is called an end plug, for flushing the sewers. But a fire-plug can always be used for flushing sewers, and I do not know of any Act of Parliament, which says that when a waterworks company are obliged to keep a fire-plug, they may not themselves use it for other purposes. There are always two keys to a fire-plug, one which is given to the fire brigade, another which is kept by the waterworks company; and the waterworks company are brought into disgrace, if their turnkey is not in the way with the key, before even the fire brigade come with their key. I believe that the waterworks company were

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compelled to put this fire-plug in the highway; at all events it is obvious to my mind that it was adopted as a fire-plug, because it is proved that the fire brigade had a key of it.

In this case the water supply is not in the hands of the road authority; the waterworks company and the road authority are perfectly distinct; therefore the question is whether the waterworks company are to be made liable for this accident. It was argued that they must be liable. Then it was asked, "But how are they to prevent this mischief? If the road is worn down, are they to mend the road?" It was answered: "No, they cannot mend the road." Then what are they to do? Why, they must cut down the fire-plug; as the road wears down, they must keep cutting down the fire-plug. That seems to be a curious liability to put upon the waterworks company. One would think that the Act of Parliament which obliges them or authorizes them to put this plug in the road, if it meant to impose upon them such a liability as that, would have said so in direct terms; but the Act of Parliament only says that they are to keep the plug in repair. Something was argued about whose property the plug became. I think that is immaterial. The Act of Parliament allows the waterworks company to put it in the highway, and says that they are to keep it in repair. It was in perfect repair, but it was the road which had been worn down.

Now it is said that if the fire-plug had not been in the highway, the wearing down of the roadway was not sufficient to make the road so out of repair, as to render the authority having the care of it indictable. That is true. Then we must see what the liabilities of these two parties are. Now if the fire-plug had been put down by authority before the road was dedicated to the public and adopted by them, then, as is clear from the decision in *Fisher* v. *Prowse* (1), the road authority and the surveyor must keep the road in repair with regard to that plug, and if they allow the road to come into such a condition that the road, having regard to the plug, is not safe, then they may be indicted. They must keep the road in repair having regard to it. If that is the law when the plug is put down before the road is dedicated, what is the condition of things when it is put there after the road

(1) 2 B. & S. 770.

exists, but is put there by authority of Parliament and not merely by contract, not merely by leave ? and further, what is to be the condition of things if a company is compelled to put it down by Act of Parliament? It seems to me that the proper result under those circumstances is, that the road authority must take notice of the Act of Parliament, and that they must keep the road fit for the public to pass along it, having regard to that which is in the road by virtue and authority of Parliament, just the same as if it had been there before the road was made, so that the road was dedicated subject to it. The Act of Parliament has said that the plug may be in the road, and the authorities must keep the road having regard to that which may or must be there by authority of the Act of Parliament. If that be true, the waterworks company have done all that the statute obliged them to do, and their whole obligation was imposed by statute, and no express liability was laid upon them in the statute ; on the contrary, a minor liability was laid upon them, and nothing is to be implied from the Act of Parliament under these circumstances.

If either party was in the wrong, it seems to me to have been the road authority. I think that no action will lie by this plaintiff against the road authority ; but it does not follow that because no action will lie against the road authority, therefore he can maintain an action against the defendants who have done no wrong. I think that he cannot maintain an action against the waterworks company under these circumstances.

It has been said that if we come to this conclusion, we must overrule *Kent* v. *Worthing Local Board.* (1) I do not think it necessary to say that we must overrule *Kent* v. *Worthing Local Board.* (1) In that case the water supply was in the hands of the the defendants, and they were also the local authority for keeping the road : they were the authority for both. It is true that in that case the valve-cover was not out of order, and in that respect it was like this case ; it was only the road which was out of order with regard to the valve-cover. If the case cannot be upheld upon the ground that the one authority was master of both situations, I respectfully differ from it, and think that it was wrongly decided. It may be that it can be upheld on that ground. My

(1) 10 Q. B. D. 118.

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Brother Lindley has pointed out to me a case extremely like *Kent* v. *Worthing Local Board* (1); it is *Blackmore* v. *Vestry of Mile End Old Town.* (2) In that case a water-meter, which was the property of a water company, and used for measuring the water supplied by the company to the defendants, the vestry of a parish, for watering the streets, was placed by the defendants in a box of theirs sunk in the footway of one of the streets and covered with an iron flap. The defendants, as such vestry, were by s. 96 of the Metropolis Management Act, 1855, the surveyors of highways, and by s. 116, authorized to cause the streets in their parish to be watered. Therefore, so far as the watering and the keeping of the road in order were concerned, there was but one authority. But then in that case the cover of the water meter had worn away until it was quite smooth, and so had become slippery. Therefore, something had happened there to the water meter; it was not in its original condition, but it had been allowed to be worn smooth. In that case the defendants were held liable, they having the control of both the roadway and the water supply. It is obvious to my mind that that case would not of itself necessarily support *Kent* v. *Worthing Local Board* (1), because in *Kent* v. *Worthing Local Board* (1) there was nothing the matter with the valve-cover, whereas in this case of *Blackmore* v. *Vestry of Mile End Old Town* (2) the cover of the water meter was out of order: it had been worn smooth so as to become slippery. I do not think it absolutely necessary for us to say that we disagree with *Kent* v. *Worthing Local Board.* (1) It may possibly at some future time be upheld on the ground of the double authority. If it cannot be upheld on that ground, I think it was wrongly decided. I do not say that that is the ground on which it was decided, but I say that unless it can be upheld as a decision on that ground, I respectfully think that it was wrong, and I am not prepared to follow it.

In this case I think the waterworks company are not liable.

LINDLEY, L.J. I am of the same opinion, and I will consider the case first of all upon the Acts of Parliament, and, secondly,

(1) 10 Q. B. D. 118. (2) 9 Q. B. D. 451.

with regard to the authorities relied on by the plaintiff, upon which Day, J., decided in his favour.

Now we cannot ascertain very accurately the history of this fire-plug; but having regard to the Act of the company passed in 1834, and the evidence of one of the witnesses, I should infer, if it is open to me to do so, that this plug, or at least the predecessor of this plug, was put down in this spot under the provisions of the Act of 1834. If I am right in that respect, it was the statutory duty of this company to put down a fire-plug somewhere about this spot; in other words, this fire-plug would have been put there in pursuance of the statutory duty. If it was not put down under that authority, it would be put down under s. 38 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), or under the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 32. Be that as it may, it was considered at all events that the old plug was lawfully in the highway and had been there for many years. In 1880, or thereabouts, the old plug was removed and the new plug was put in its place.

We were invited by the counsel for the plaintiff to say that the evidence authorized the inference that this plug was not properly fixed at the time when it was put down, that is to say, that no reasonable allowance was made for that which would obviously take place, namely, a certain amount of wear and tear in the asphalte. If that had been made out, the plaintiff's case would have been very different to what it is; but I cannot, from the evidence, arrive at that conclusion. On the contrary, the evidence appears to me to establish beyond doubt that this plug, when put down in this road of asphalte, was put down in every sense properly. There was some inspection on the part of the road surveyor. The plug itself was a trifle below the dead level of the road; some allowance was made and, so far as we can see, a reasonable allowance was made, to provide against all unforeseen circumstances, and I do not think from the evidence that the contention, that there was negligence in putting in the plug, can be supported. Now, it is admitted on all hands that unless that contention can be sustained, no fault can be found with the plug; the plug itself was not out of repair, and there was nothing the matter with it. It had not grown; it had not

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changed in any way. The history of the matter is that the asphalte road was worn away, and the result was that the fire plug stood up three-eighths of an inch above the level of the pavement. The plaintiff unfortunately fell over it and was very seriously injured. When we look at the duty cast on the waterworks company by the Acts of Parliament which related to them, and, more particularly, by the Waterworks Clauses Act, 1847, we cannot find anything more extensive than the obligation, which is cast upon them by the 39th section, to "renew and keep in effective order every such fire-plug." Then there are provisions about keys which I need not notice. Nothing in the Act expressly or by necessary implication either compels the company to repair the road, or authorizes them to repair the road, and I cannot find that they have committed any breach of any statutory obligation. Their statutory right and their statutory obligation are satisfied by putting down this plug and keeping it in repair, and doing what the statute requires as regards the keys and other matters. Then it is said that at common law, if anyone maintains something in a highway, he must take care that it is not a nuisance, and does not obstruct the traffic. I think that, as a universal proposition, that is not true, as is shewn by those cases where high roads have been dedicated subject to obstruction; and I am not able to find any authority which goes the length of deciding that a person who is authorized or compelled by Act of Parliament to put a thing in the highway, is bound to do more than the statute requires him to do. Suppose, for example, the pipes of this waterworks company to be somewhat below the level of the surface, and a storm to carry the whole of the surface away, so as to leave their pipes uncovered and projecting: I take it that the company could not be indicted for a nuisance for having the pipes so exposed, although the pipes might be an obstruction to the traffic. It appears to me, however, apart from authority, that the plaintiff has not shewn, that these defendants have either by a matter of commission or omission neglected any duty which is cast upon them by law.

Then it has been argued that there are cases which shew that the company are liable, and in particular there is the case of

Kent v. *Worthing Local Board.* (1) Now that case, unquestionably, in some respects was extremely like this. In the first place, I will observe there that the decision of the Court proceeded upon a decision in the Privy Council in *Borough of Bathurst* v. *Macpherson* (2), which, I do not think myself, warranted the inference which the Court drew from it. In *Borough of Bathurst* v. *Macpherson* (2) the defendants were held liable for a drain which was out of repair, and which it was their duty to keep in repair, and which led to the accident in the highway. Of course if the drain was out of repair, and by reason of that there was a hole into which someone fell, there could be no defence to the action. But here we are assuming that there was nothing the matter with the plug, except the fact that it projected above the level of the road. There are some other cases which would enable the plaintiff to maintain this action if this plug had been unfit for its position, the road being in the state in which it ought to have been. For example, in the case referred to by the Master of the Rolls, *Blackmore* v. *Vestry of Mile End Old Town* (3), the same authority had control over the road and over the flap which protected the water meter, the flap itself having become worn away so as to become slippery. There it was held that an action would lie against the defendants upon the ground that they were maintaining in the highway that which of itself was dangerous, the rest of the highway being in the condition in which it ought to have been. I do not feel myself pressed in any way by that authority. But in *Kent* v. *Worthing Local Board* (1) there is certainly a difficulty, because the valve-cover was in repair, but projected a little above the road. The distinction—and it appears to me, I confess, to be a distinction which is well worth considering—is this, that in the case of *Kent* v. *Worthing Local Board* (1) the same authority had control over the highway and over the valve-cover; and although the decision did not proceed upon this ground, the importance of it appears to me to arise in this way: we all know that a parish and a surveyor could not be sued at law for an accident arising from mere non-repair, and that doctrine, so far as the parish is concerned, rested upon the ground that there was no one to sue. The parish might be indicted,

(1) 10 Q. B. D. 118. (2) 4 App. Cas. 256.
(3) 9 Q. B. D. 451.

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but was not liable to an action. *Gibson* v. *Mayor of Preston* (1) decided that that common law doctrine applied, even although the road authority was incorporated, and therefore was capable of being sued in an action at law. It was held there that, upon the construction of the Public Health Acts, the local board, although it was capable of being sued, was no more liable for accidents of this kind than the parish or the surveyor. It may be that the principle of that case does not apply to the road authority where they have a control, not only over the road, but over the thing which creates a nuisance: in other words, it may be that *Gibson* v. *Mayor of Preston* (1) is somewhat anomalous, and that it is not to be extended to cases which are not exactly like it. If *Kent* v. *Worthing Local Board* (2) is not to be distinguished from this case upon that ground, then in my opinion it is erroneous. But I am not prepared to say that it cannot be so distinguished, and I am not prepared therefore now to overrule it. It appears to me that when we look into the authorities we find none of them touching this, and that to decide in favour of the plaintiff would be to make the water company liable for a breach of duty by other persons. I am aware that this will be rather a hard decision on the plaintiff, for if *Gibson* v. *Mayor of Preston* (1) was right —and I do not say that it was wrong—then the plaintiff cannot sue the road authority; but it does not follow that because the road authority—who, in my opinion, are in the wrong—cannot be sued, therefore the waterworks company, who have done no wrong, are to be held liable. I think, therefore, that the judgment ought to be for the defendants, with costs here and below.

LOPES, L.J. This case raises a difficult and an important question. The facts of the case, I think I am justified in saying, are pretty well admitted.

The fire-plug, beyond all question, had been lawfully placed where it was; it was proper in itself; it was properly fixed; at the time of the accident it was in proper order. With regard to the asphalte path, that, too, was in perfect order; only its level had been reduced by ordinary wear and tear, so that the effect was that the plug was three-eighths of an inch higher than the level of the path. Therefore nothing was wrong either with the

(1) Law Rep. 5 Q. B. 218. (2) 10 Q. B. D. 118.

fire-plug or with the path. The plaintiff, however, when walking along the path, fell over the plug and was seriously injured, and has brought this action, and obtained damages against the defendants.

It has been argued that under these circumstances the defendants, the waterworks company, are liable to the plaintiff. I take it that the defendants cannot be made liable, unless they have been guilty of some breach of duty. I am at a loss to see any breach of duty of which they have been guilty: so far as the statute is concerned, clearly there is no breach of duty. The 39th section of the Waterworks Clauses Act, 1847, provides that they are to renew and keep the plug in effective order. It cannot be said here that this fire-plug was not in effective order, because, as I have already said, there was nothing the matter with it.

Then at common law can it be said, that there was any obligation upon them to keep this plug, so as to accommodate it to the varying level of the path? I know of no authority for that contention except the case of *Kent* v. *Worthing Local Board* (1), with which I will deal presently.

It may be that the plaintiff has suffered a wrong for which there is no remedy; but still, the plaintiff, in order to maintain the judgment in his favour, must make out that the defendants have committed an actionable wrong. I can see no actionable wrong that they have committed.

Now, whether the road authority could be made liable if an action had been brought against them, it is not necessary for me to express any opinion; but, speaking for myself, I should be inclined to think, on the authority of *Gibson* v. *Mayor of Preston* (2), that they could not have been made liable. That case was decided some time ago, and has been consistently acted upon ever since.

The judgment of the Court below proceeded upon the authority of *Kent* v. *Worthing Local Board*. (1) That was the authority which was relied upon. The facts in that case, as they appear to me, are similar to these. The iron cover of a valve connected with a water main was properly fixed in a highway by the defendants, but, in consequence of the ordinary wearing away of the highway, the valve cover projected an inch above it. The plaintiff's horse, using the highway, stumbled over the

(1) 10 Q. B. D. 118. (2) Law Rep. 5 Q. B. 218.

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valve cover and was hurt. In an action against the defendants, who were both the water authority and the highway authority, for the injury to the horse, it was held that it was the duty of the defendants to make such arrangements that works under their care should not become a nuisance to the highway, and that the plaintiff was entitled to recover. The facts, therefore, were nearly similar to these now before us, and I am unable to distinguish that case from this, unless there is anything in the fact that the water authority and the highway authority were the same body: in the present case the water authority are the only defendants, and are sued alone. I do not think myself there is anything in that distinction, and, not thinking that there is anything in that distinction, I feel a difficulty in following that case. In point of fact I cannot see how this Court can avoid overruling it; because it is to be observed that the decision did not proceed at all upon the fact, that the water authority and the highway authority were the same persons. The words of Stephen, J., who delivered the judgment of himself and Field, J., are these (1): "In the words of the judgment in *Bathurst* v. *Macpherson* (2), the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway, which, but for such artificial construction, would not have existed." Now, if that is correct, every word of it applies here. I cannot adopt it. The Court seems to have proceeded upon the authority of two cases, *White* v. *Hindley Local Board* (3) and *Borough of Bathurst* v. *Macpherson*. (2) It seems to me that those cases were not authorities for the conclusion at which the Queen's Bench Division arrived, because, in the case of *White* v. *Hindley* (3), the accident was caused by a defective grid, which was used partly to stop the hole which otherwise would have been left in the road; the grid stood very much in the position of the fire-plug in this case, which, it is admitted, was in a perfect state. Again, in *Borough of Bathurst* v. *Macpherson* (2), the accident was caused by the defective state of a barrel drain, which was in such a state that the adjacent soil of the road washed into it and made a hole. The drain itself, therefore, the property of the defendants, was in a defective state. The drain there stood in the same position as the fire-plug here, which

(1) 10 Q. B. D. 123. (2) 4 App. Cas. 256. (3) Law Rep. 10 Q. B. 219.

admittedly had nothing wrong with it. I, myself, cannot see anything in the distinction which has been suggested between this case and *Kent* v. *Worthing Local Board* (1); and, so far as I am concerned, if our decision is right now, I think that that case must be overruled, and ought to be overruled.

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Judgment for the defendants.

Solicitors for plaintiff: *Grundy, Izod, & Grundy.*

Solicitors for defendants: *Hicklin, Washington, & Pasmore.*

J. E. H.

[IN THE COURT OF APPEAL.]

Aug. 3, 4.

THE EAST LONDON WATERWORKS COMPANY *v.* THE VESTRY OF ST. MATTHEW, BETHNAL GREEN.

Waterworks—Water Company, Power of, to do Works in a Street—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 32—*Metropolis Water Act*, 1852 (15 & 16 *Vict. c.* 84), *s.* 26—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *ss.* 17, 24.

The 28th section of the Waterworks Clauses Act, 1847, provides that the undertakers may open and break up the soil and pavement of streets within their district and lay down and place pipes, conduits, service pipes, and other works and engines, and do all other acts which they shall from time to time deem necessary for supplying water to the inhabitants of the district. The 32nd section of the same Act provides that, when the undertakers open or break up the road or pavement of any street they shall, with all convenient speed, complete the work for which the same shall be broken up and fill in the ground and reinstate and make good the road or pavement so opened or broken up.

Held, that the power given by the 28th section includes any works which the undertakers may deem necessary for the purpose of regulating the supply of water, and is not confined to the laying down of apparatus underground, but enables the undertakers to place such works on the surface of the street as may not be inconsistent with the substantial reinstatement of the road or pavement in its previous condition or create a nuisance; and therefore that a water company was authorized by the section to place in the pavement of a street covers or guard boxes to protect stop-valves placed for the purpose of regulating the supply of water in the communication pipes, by which water was supplied to premises in the street, such covers or guard boxes not creating a nuisance or being inconsistent with the substantial reinstatement of the pavement.

APPEAL from the judgment of the Queen's Bench Division (Mathew and A. L. Smith, JJ.), upon a special case, the facts of which were in substance as follows:—

The plaintiffs claimed damages for the removal by the defen-

(1) 10 Q. B. D. 118.

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dants of certain covers or guard boxes protecting the plaintiffs' stop valves in the Bethnal Green Road and elsewhere in the defendants' parish, and also an injunction to restrain the defendants from interfering with such covers or guard boxes in future.

By the plaintiffs' special Acts, which incorporated the provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28–34, with respect to the breaking up of streets, the plaintiffs were empowered to supply water in a district which included the parish of St. Matthew, Bethnal Green.

By the 28th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is provided that the undertakers, under such superintendence as thereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act . . . and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines . . . and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district, &c. By the 32nd section of the same Act it is provided that whenever the undertakers open or break up the road or pavement of any street they shall with all convenient speed complete the work for which the same shall be broken up and fill in the ground and reinstate and make good the road or pavement.

By the Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 26, it is enacted as follows: "It shall be lawful for any company from time to time with the approval of the Board of Trade to make such regulations as shall be necessary or expedient for the purpose of preventing the waste or misuse of water, and therein, amongst other things, to prescribe the size, nature, and strength of the pipes, cocks, cisterns, and other apparatus to be used, and to interdict any arrangements and the use of any pipes, cocks, cisterns, or other apparatus which may tend to such waste or misuse as aforesaid. By the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), ss. 17, 24, it is enacted as follows:— "17. Every company shall within six months after the passing of this Act make regulations for the purposes for which regulations may be made under the authority of s. 26 of the Metropolis Water Act, 1852, and the provisions of that section shall apply also to the preventing of undue consumption or contamination of water."

"24. All regulations . . . shall, after publication in manner by the last preceding section of this Act directed, be binding upon and be observed by all parties and shall be sufficient warrant for all persons acting under the same, and a company shall not be bound under any agreement to supply or continue to supply water to any premises unless such regulations as are for the time being in force are duly observed in respect of those premises."

Regulations had accordingly been made by the plaintiffs, and having been confirmed by the Board of Trade had been duly published by the plaintiffs. The 12th of such regulations provided as follows: "Every communication pipe for the conveyance of water to be supplied by the company into any premises shall have at or near its point of entrance into such premises, and if desired by the consumer within such premises, a sound suitable stop valve of the screw-down kind with an area of waterway not less than that of a half-inch pipe and not greater than that of the communication pipe, the size of the valve within these limits being at the option of the consumer. If placed in the ground such stop valve shall be protected by a proper cover and guard box."

The plaintiffs, claiming to act under this regulation, placed stop valves in the communication pipes supplying water to certain houses in the Bethnal Green Road, and placed such stop valves outside the houses in the ground at or near the point of entrance of such pipes, not within the premises but on the public footway. For the purpose of protecting the said stop valves and obtaining convenient access to them and of detecting waste the plaintiffs placed in the pavement above the said stop valves and on the public footway certain covers and guard boxes as provided by the 12th regulation.

The defendants had the control or management of the Bethnal Green Road within the meaning of the Waterworks Clauses Act, 1847, s. 30, and were the vestry under the Metropolis Management Act, 1855, ss. 96, 98, 109–114, and the Metropolis Management Amendment Act, 1862, s. 82.

The plaintiffs after completing the work of placing the covers and guard boxes filled in the ground and reinstated and made good the pavement so far as was possible during the continuance

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of the covers and guard boxes, but the footway was not completely repaved in so far as the insertion of the guard boxes was inconsistent with a complete repaving, but only so far as the existence of the covers and guard boxes made it inconsistent.

The defendants, claiming to act as the street authority under the Metropolis Management Acts, removed the said covers and guard boxes in order to make the footway pavement continuously of the same material and construction as it was before the operations of the plaintiffs.

The question for the Court was whether the plaintiffs were entitled to maintain the action.

The Court below gave judgment for the plaintiffs, against which decision the defendants appealed.

Finlay, Q.C., and *Beven*, for the defendants, contended that the power given by the 28th section of the Waterworks Clauses Act, 1847, was confined to underground works, such as the laying of pipes, which were not inconsistent with the reinstatement of the road and pavement required by the 32nd section, and therefore did not authorize the placing of anything on the surface preventing the replacing of the pavement exactly as before. They also contended that the provisions of the 26th section of the Metropolis Water Act, 1852, and the 17th and 24th sections of the Metropolis Water Act, 1871, only gave power to the company to make regulations to prevent the consumers or others from wasting or unduly consuming or contaminating the water, and that regulations made thereunder could not authorize the company to interfere with the surface of the street, which was vested in the defendants, by placing apparatus in the pavements.

[They cited *Coverdale* v. *Charlton*. (1)]

Sir R. E. Webster, Q.C., and *R. S. Wright*, for the plaintiffs, contended that the regulations made under the provisions of the Metropolis Water Acts, 1852 and 1871, were binding not only on the consumers but on all persons, and that everything necessary for the purposes of such regulations was to be deemed necessary for the supply of water within the meaning of the 28th section of the Waterworks Clauses Act, 1847, and that that

(1) 4 Q. B. D. 104, 121.

section therefore authorized the placing of the covers or guard boxes in the pavement as being matters which the undertakers deemed necessary for the supply of water. They also contended that it was sufficient if the pavement was substantially reinstated after the execution of the works.

[They cited *Wandsworth Board of Works* v. *United Telephone Co.* (1)]

LORD ESHER, M.R. I am of opinion that this appeal must be dismissed. A supply of water in large towns has been considered by the legislature necessary for the public good; and formerly, when the water supply was only intermittent, it was absolutely essential that the water companies should have power to interfere with the surface of the streets from time to time, and to some extent permanently. For where there was a higher and lower district to be served, it was necessary to turn off the water in the lower district while serving the higher, and therefore it was necessary that there should be plug-holes in the street by which the water could be turned off by the turncocks, and these were very numerous, and always interfered to some extent with the surface; and where they were put down it was impossible to reinstate the surface exactly as it was before. Lately it has been thought fit that there should be provision made for a constant service of water. Even with such a service it seems to me that it might be necessary that such means should exist for turning off the water as I have mentioned: but another matter arises in connection with a constant supply, and that is the liability to waste of water. That seems to have been foreseen and provided for by the legislature; and by the Act of 1852 provisions are made by which the water companies are enabled from time to time to make such regulations as shall be necessary or expedient for preventing the waste or misuse of water, but, to obviate the possibility of any autocratic and arbitrary use of this power by the company, such regulations must be sanctioned by the Board of Trade. The exercise of the power thus given was optional; but in 1871, by the Metropolis Water Act, 1871, s. 17, it was made compulsory, and the power was extended to the making of

(1) 13 Q. B. D. 904.

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regulations for the prevention of the undue consumption or contamination of water. I cannot but think that the power so given was intended to include a power to provide for the doing of all works and things necessary for making the regulations against the waste or misuse of water and other matters effective in practice. The 24th section of the Act of 1871 provides that all such regulations shall, after publication in the manner specified, be binding on "all parties," by which words are meant, I think, not only the consumers of the water, but all other bodies or persons interested in the matter, such as the street authority or those who are charged with the duty of putting out fires. It further provides that the regulations shall be a sufficient warrant for all persons acting under the same—a provision which I think applies to the persons actually doing any work or thing under the same. Even if these provisions had stood alone, I should have been inclined to think they might have been held to give power to do any works that were necessary to make such regulations effective; but it does not seem to me necessary to decide that point, because I think that the company has power to do such works under another provision, viz. the 28th section of the Waterworks Clauses Act, 1847. That section provides that the undertakers may open and break up the soil and pavements of the several streets, &c., within the limits of the special Act, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and do all other acts which they shall from time to time deem necessary for supplying water, &c. I think the expression, "necessary for supplying water," includes such matters as may be necessary for the regulation of the supply of water. For the purpose of the regulations which the plaintiffs have made, these works which the plaintiffs have done are necessary in order to regulate the supply of water, and by making such regulations the plaintiffs have shewn that they deem them necessary. Therefore it seems to me that the 28th section gave them power to do these works. The control which the Board of Trade has over these regulations will prevent any exercise of the powers of the water companies in these respects in a manner dangerous or detrimental to the interests of the public in the public streets. For these reasons I think the judgment of the Court below must be affirmed.

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BOWEN, L.J. I am of the same opinion. The question is whether the company in doing what they did acted within their powers. If not, it is not disputed that the vestry was the proper body to interfere. I must say that it appears to me that, if what the company did was justifiable, it must be by virtue of the 28th section of the Waterworks Clauses Act, 1847. I cannot see how any regulations the company have power to make, and may make, even with the sanction of the Board of Trade, can give them the power to do these works. The 28th section in terms gives power to break the surface, but that power must no doubt be exercised so as not to create a nuisance in the street, because by the 32nd section the undertakers are to reinstate and make good the road or pavement, and though, as it appears to me, the word "reinstate" must be construed broadly and reasonably, it could not be said that the road or pavement was reinstated and made good, if a nuisance was left therein. It is not alleged that the works done by the plaintiffs did constitute a nuisance. But then it is said that, though the company may under s. 28 break open the surface, the meaning is that they may only do so for the purpose of putting down pipes or other works below the surface, but that they may not occupy any part of the surface itself with their works. That question seems to me to depend on whether the defendants are right in their contention that the provision with regard to reinstatement of the surface means that the reinstatement must be made so that every inch of the surface is left as before. I do not think that is a reasonable view. I think the meaning is that the surface must be substantially reinstated for the purposes of a road or pavement. From 1847 down to the Act of 1871 the company only required to utilize the powers given by this section for the purpose of such works as were necessary for an intermittent supply of water. By the Metropolis Waterworks Act, 1852, while the supply of water was still intermittent, a power was given enabling regulations to be made by the company for preventing the waste or misuse of water. The 26th section of the Act which gives this power is one of a group of sections which seem to be directed to the prevention of the misuse of water by the consumer, and I cannot help thinking that the primary intention was that the regulations to be made

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were to regulate the relations between the company and the consumer, though I do not say that they might not refer to the conduct of outsiders as far as might be necessary in regard to the regulation of such relations, e.g., if it were necessary to put a stop valve outside the premises of the consumer to regulate the supply of water to him there might be a regulation to prevent any one meddling with or injuring it. Then, when we come to the Act of 1871, a constant supply is provided for, and for the purposes of such a supply new works and matters become necessary within the meaning of s. 28 of the Act of 1847, which were not necessary before; and new provisions are made by s. 17 for the making of regulations, which render it compulsory to make such regulations, and which relate to the undue consumption and contamination of water as well as the matters provided for by s. 26 of the Act of 1847. Still, however, it seems to me, though it is not necessary to decide the point, that the primary scope of these regulations as before is intended to be the regulation of the relations between the consumer and the company. It does not seem to me that, if the only authority, upon which the company could rely to justify the execution of these works, was derived from these regulations, their position would be a very strong one, for I cannot see how the right of entry upon the surface of the street to do these works can be the subject of a regulation with regard to the waste, misuse, undue consumption, or contamination of water. It seems to me that the plaintiffs must go back for their authority to s. 28 of the Waterworks Clauses Act, 1847. I think that they were under that section entitled to do all such acts as they might deem necessary for the supplying of water, and therefore they were justified in doing these works.

FRY, L.J. I am of the same opinion. The most material of the provisions to which our attention has been called is the 28th section of the Waterworks Clauses Act, 1847, as explained and made applicable by the provisions of subsequent Acts. I think the words "which the undertakers shall deem necessary for supplying water" are to be read not as referring only to what is necessary merely for the actual supply of the water, but as including any matter reasonably necessary in connection therewith, as

for instance anything necessary for the prevention of the waste or misuse of water. Anything that is necessary to the successful conduct of the undertaking seems to me, in this sense, to be necessary for the supply of water. The Act of 1871 having provided for a constant supply of water, I think that the company may do under the 28th section all things necessary or expedient in relation to such constant supply, for whatever is expedient the company may reasonably deem necessary. In this case the regulation they have made shews that they think these stop valves necessary for the purposes of the constant supply. It is argued that the 28th section relates only to underground works, and that the subsequent section which provides for reinstatement of the surface shews this to be the case. I do not agree with that view. I think that any surface work which would be inconsistent with the reinstatement of the surface would not be within the authority given; but I think that the company may do any surface work which is deemed by them necessary for the purposes of the water supply, and which is not inconsistent with such reinstatement. I cannot see that the works done by the company in this case are inconsistent with the substantial reinstatement of the surface. There may no doubt be a slight difference between the surface as reinstated and as it previously existed, but that must be so in all cases, and the Act does not, as it seems to me, require that the surface shall be reinstated exactly as it was before. With regard to the Act of 1852, it seems to me that, when it comes to be looked at, it gives power to the company to make any regulations which may effect the object specified, viz., the prevention of the waste or misuse of water. It is to be borne in mind, I think, that there were two classes of persons who might be guilty of causing a waste of water, the first class, and that which no doubt was primarily aimed at, being the consumers, the second being street authorities by whose arrangements water might be wasted. I am not therefore prepared to say that the regulations contemplated by s. 26 were regulations applicable to consumers only. I am disposed to think that the street authority whose arrangements might affect the company was also contemplated. When we come to the Act of 1871, we find that by the 24th section the regulations are to be binding on all parties. I was inclined at first to see whether

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these words could not be construed in their proper sense, viz., as meaning parties to a contract, but on the whole I think they must be considered as equivalent to "all persons." In any case, however, it seems to me that the 28th section of the Act of 1847 gave a right to the plaintiffs to do what they did, and, therefore, the judgment of the Court below must be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Birchams.*
Solicitor for defendants: *Robert Voss.*

E. L.

July 26.

BIANCHI *v.* OFFORD.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), *ss.* 7, 9—*Form in Schedule, Deviation from—Covenant necessary for maintaining the Security.*

By a bill of sale given by way of security for the repayment of money, the mortgagor covenanted to repay the principal sum of 300*l.*, with interest thereon at the rate of 40 per cent. per annum, by equal quarterly payments of 180*l.* each, on certain dates specified, until the whole of the said principal money and interest was repaid, and it was provided that, if the mortgagor did not pay the rent, rates, taxes and outgoings of the premises on which the goods assigned might be within seven days after the same respectively became payable, the mortgagees might, if they thought fit, pay such rent, rates, taxes and outgoings, and all sums of money so paid by the mortgagees, with interest thereon at the same rate as aforesaid, should be charged on the goods assigned, and be recoverable in the same manner as the principal moneys and interest secured by the bill of sale:—

Held, that such bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

INTERPLEADER ISSUE tried before Bowen, L.J., without a jury.

The plaintiff in the issue claimed certain goods, which had been taken in execution, as assignee of a bill of a sale given by the execution debtor. It was contended for the defendant, the execution creditor, that the bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. By the bill of sale, which was dated the 13th of July, 1885, the mortgagor in consideration of an advance of 300*l.* assigned to the mortgagees certain household furniture by way of security for the payment of the principal sum and interest thereon at the rate of 40 per cent.

per annum, and covenanted to pay the principal sum together with the interest then due by equal quarterly payments of 180*l.* each, the first of such payments to be made on the following 14th day of October, and a like payment on the second Wednesday in every succeeding third month, until the whole of the said principal sum and the interest thereon should be fully paid. The mortgagor further agreed by the bill of sale that during the continuance of the security he would pay the rent, rates, taxes, and outgoings of the premises whereon the goods assigned might be within seven days after the same should respectively become payable, and would immediately on the expiration of such seven days produce to the mortgagees, upon demand being made in writing, the respective receipts for such rent, rates, taxes and outgoings respectively, and that, if the mortgagor should neglect or refuse to pay the said rent, rates, taxes, and outgoings, within the said seven days, or on the expiration thereof to produce to the mortgagees as aforesaid the respective receipts for such rent, rates, taxes, and outgoings respectively, then and in any such case it should be lawful for the mortgagees, if they should think fit, to pay any rent, rates, taxes, and outgoings of the said premises, which might then be due and owing, and that all sums of money so paid by the mortgagees, together with interest thereon after the rate aforesaid, computed from the date of payment up to the actual day of repayment, should be charged on the goods assigned, and should be recoverable in the same manner as the principal moneys and interest thereby secured; and it was thereby agreed and declared that the goods assigned should be liable to seizure or to be taken possession of by the mortgagees for any of the causes specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, and that they should not be liable to seizure or to be taken possession of by the mortgagees for any cause other than those specified in that section.

Herbert Reed, for the plaintiff.

Patchett, Q.C., and *C. J. Peile*, for the defendant.

Cur. adv. vult.

July 26. BOWEN, L.J. This case raises a question as to the validity of a bill of sale. By the Bills of Sale Act (1878)

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Bowen, L.J.

Amendment Act, 1882, s. 7, seizure of the goods included in a bill of sale can only take place in certain cases, one of such cases being that specified in sub-s. 1, viz., where the grantor makes default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security. It follows from this provision that there must be a sum of money secured, and a time fixed for the payment thereof. By the present bill of sale, after a covenant that the mortgagor would pay the principal sum advanced and interest thereon at the rate specified by equal quarterly payments, the mortgagor agreed with the mortgagees that he would pay the rent, rates, taxes, and outgoings of the premises whereon the chattels assigned might be within seven days after the same respectively should become payable, and would immediately on the expiration of such seven days produce to the mortgagees, upon demand being made in writing, the respective receipts for such rent, rates, taxes and outgoings respectively; and that, if the mortgagor should neglect or refuse to pay the said rent, rates, taxes and outgoings of the premises within the said seven days, or on the expiration thereof to produce to the mortgagees as aforesaid the respective receipts for such rent, rates, taxes, and outgoings respectively, then and in every such case it should be lawful for the mortgagees, if they should think fit, to pay any rent, rates, taxes, and outgoings of the premises which might then be due and owing, and that all sums of money so paid by the mortgagees, together with interest thereon at the rate aforesaid, computed from the date of payment up to the actual day of repayment, should be charged on the goods assigned, and should be recoverable in the same manner as the principal moneys and interest thereby secured. It was not seriously denied that the effect of the words "shall be recoverable in the same manner as the principal moneys, and interest hereby secured" was intended to be that, if default were made in the payment of such further sums, there should be a power to seize the goods just as if there had been default in payment of the principal moneys and interest. It must be observed in the first place that upon the terms of this bill of sale it is very difficult to ascertain at what time or times, and in what manner the repayment of these sums advanced for

payment of rent, &c., is to be made, whether they are to be added to the principal and paid together therewith by instalments, with interest at the same rate, or whether they are to be paid separately. It would in any view be a very complicated matter for the mortgagor to ascertain how and when these sums were to be paid. I think this case is concluded by the recent case of *Ex parte Stanford, In re Barber* (1), by which I am bound, and which constitutes, as it were, a new departure in the law applicable to these cases. According to the law as there laid down the bill of sale must in all material respects be in accordance with the form in the schedule, and it must therefore, I think, specify a definite sum secured payable at a definite time, or it must specify a sum and a time of payment which will become definite upon the happening of an event or events specified by the parties in the instrument. I cannot think that the form is complied with in these respects by a bill of sale which provides, as this does, that the mortgagees may, in events which may or may not happen, at their option, advance from time to time indefinite sums and add the same to the principal moneys charged upon the goods assigned. I do not think that such further sums could be sums secured by the bill of sale within the meaning of s. 7, sub-s. (1). Then can it be said that the provision for seizure on default in payment of these further sums would be justifiable on the ground that the covenant is one necessary for the maintenance of the security? It does not appear to me that in the case before us there was anything to shew that the provision that the mortgagees might pay sums of money for rent, rates, taxes, and other outgoings, and that, if the same were not repaid, the goods might be immediately seized, was necessary to the maintenance of the security. It may be that such a provision might be convenient or useful in the interests of a bill of sale holder, but that is not enough; it must be necessary for the maintenance of the security, and in the present case I do not see any grounds for coming to the conclusion that it was so necessary.

Judgment for the defendant.

Solicitor for plaintiff: *J. A. Parry.*

Solicitor for defendant: *C. T. Foster.*

(1) 17 Q. B. D. 259. E. L.

1886
June 25.

[IN THE COURT OF APPEAL.]

Ex parte BROWN. In re SMITH.

Bankruptcy—Trustee in Bankruptcy—Unreasonable Rejection of Proof—Directions of Committee of Inspection—Costs—Judgment entered under Judge's Order by Consent in Personal Action—Omission to file Order—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 89—*Debtors Act*, 1869 (32 & 33 *Vict.* c. 62), s. 27.

The Court in reversing the decision of the trustee in a bankruptcy rejecting a proof, ordered him to pay the costs personally, being of opinion that he had acted unreasonably and improperly in rejecting it.

A trustee in bankruptcy rejected a proof tendered in respect of a debt for which judgment had been entered against the bankrupt in the Queen's Bench Division under a judge's order by consent, on the ground that the order had not been filed as required by s. 27 of the Debtors Act (32 & 33 Vict. c. 62), so that the judgment was void.

The trustee in rejecting the proof acted under the directions of the committee of inspection:—

Held by the Court of Appeal, affirming the judgment of Cave, J., that there was no ground for contending that the invalidity of the judgment affected the right of the plaintiff to prove for the debt for which the action was brought; that the decision of the trustee must be reversed with costs, to be paid by him personally; and that the fact that he had acted under the directions of the committee of inspection did not affect his liability.

Appeal by the trustee in bankruptcy of Henry Gregory Smith from an order made by Cave, J., overruling the rejection in part by the trustee of a proof tendered against the estate of the bankrupt by John Clutton and W. S. Law Hussey, as executors of George Smith, deceased, who was the father of the bankrupt.

On the 17th of June, 1884, Clutton and Hussey commenced an action in the Queen's Bench Division against the bankrupt, claiming, as executors of George Smith, 49,173*l.* 17*s.* 10*d.*, the balance of a sum of 50,000*l.*, money lent by George Smith to the defendant; and on the 19th of June, in pursuance of a judge's order made by consent, they signed judgment for the sum claimed and costs. The judge's order was not filed as required by s. 27 of the Debtors Act, 1869. After this judgment had been signed the defendant was adjudicated a bankrupt. A receiving order had been made against him on the 20th of September, 1884. On the 28th of January, 1885, Clutton and Hussey, as executors of

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G. Smith, tendered a proof in the bankruptcy for 41,863*l.* 14*s.* 3*d.* "for money lent by the said George Smith to the said H. G. Smith, and for money paid by us as executors of the said G. Smith under a guarantee given by the said G. Smith in respect of a debt due from the said H. G. Smith, and for interest and otherwise, as appears in the first schedule hereto." The first schedule contained a statement of account shewing the particulars of the debt of 41,863*l.* 14*s.* 3*d.* One of the items in the first schedule was as follows:—

	£	*s.*	*d.*
"Amount for which judgment was on the 19th of June, 1884, signed in an action against the said H. G. Smith at our suit in the Queen's Bench Division, being for money lent to the said H. G. Smith by the said G. Smith deceased . . .	49,173	17	10
"Costs of action allowed in the said judgment	4	14	0
	£49,178	11	10
"Interest on the judgment debt from the 19th of June, 1884, to the 28th of September, 1884, the date of the receiving order .	£490	15	3"

There were other items in the account and certain deductions, which left a balance of 41,863*l.* 14*s.* 3*d.*

The trustee gave notice that he rejected the proof "as to 49,178*l.* 11*s.* 10*d.* and 490*l.* 15*s.* 3*d.*, being the amount of the judgment and interest thereon mentioned in the first schedule to the proof, on the ground that it was a judgment signed or entered up under a judge's order made by consent given by the bankrupt in a personal action, and, a copy of that order not having been filed pursuant to s. 27 of the Debtors Act, 1869, the said judgment, and any execution issued or taken out on such judgment, is void."

The trustee had been directed by the committee of inspection to reject the proof.

Clutton and Hussey applied to the Court to reverse the decision of the trustee, and on the 15th of February, 1886, Cave, J., ordered "that the rejection of the proof by the trustee be over-

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ruled, and that the proof of debt do go back to the trustee to exercise his judgment on the same as presented upon the merits." And it was ordered that the trustee should personally pay to the applicants their taxed costs occasioned by the rejection, and that the amount of such costs should not be allowed to the trustee out of the bankrupt's estate.

From this order the trustee appealed.

Cooper Willis, Q.C., and *Sidney Woolf*, for the appellant. The trustee was justified in rejecting the proof. Sect. 27 of the Debtors Act, 1869, makes the judgment void altogether, because the judge's order was not filed. The consent to the judgment amounted to a fraudulent preference of the executors. The trustee rejected the proof bonâ fide, and he ought not to be ordered to pay costs personally: *Ex parte Wainwright.* (1) Moreover, the trustee acted under the directions of the committee of inspection, and sub-s. 1 of s. 89 of the Bankruptcy Act, 1883, provides that, "subject to the provisions of this Act, the trustee shall, in the administration of the property of the bankrupt, and in the distribution thereof amongst his creditors, have regard to any directions that may be given. . . . by the committee of inspection." The committee are appointed by the creditors. The trustee has at the most been guilty of an error of judgment, and he ought not to be mulcted in costs. At any rate, no order for the payment of costs should be made against him until the proof has been adjudicated upon on its merits.

Winslow, Q.C., and *Wace*, for the executors, were not heard.

LORD ESHER, M.R. In my opinion this is a very clear case. When we look at the proof (that is, the claim to prove which was tendered), it is clear that the creditors were claiming to prove in respect of the judgment, and also, if they were obliged to go behind the judgment, to prove in respect of the consideration on which the judgment was founded. By reason of their inadvertence in omitting to file the judge's order, it is impossible for them to say that there is a binding judgment upon which execution can be issued. But the consent was given by the defendant

(1) 19 Ch. D. 140.

to a claim which was made upon him as a legal claim, upon which the executors intended to insist. It has been suggested that his consent amounted to a fraudulent preference of the executors. To my mind there is no evidence whatever of that, and no pretence for saying that there was a fraudulent preference. It is not suggested that he was really intending to defraud his creditors. He practically admitted that he had no defence to the executors' claim, and therefore consented to the judgment. That being so, the trustee in the bankruptcy takes the objection that the judgment is not binding by reason of its not having been filed, and then he says, You have not given me all the details and particulars of this alleged loan by the father to the son, and therefore I reject the whole proof. Has he any other ground for suspecting this admission by the son that his father had lent him the money? He cannot even now suggest any reason for supposing that it is untrue, except this, that he has not the detailed particulars of the alleged debt, particulars which it is almost impossible should be given after the father's death. The trustee seems to have persuaded himself, or to have been persuaded, that he ought to take advantage of the technical difficulty about the judgment to reject the whole proof summarily, without considering whether any debt was due. Cave, J., has said that he cannot do that; that, though the judgment is void and cannot be relied upon as establishing a judgment debt, the trustee ought to have examined into the claim on its merits, and he has sent the case back to the trustee that he may do this. Of course that ought to be done. But the learned judge has gone further, and has said that, in taking this technical objection to the judgment and rejecting the whole proof, when he had no real ground for suspicion, the trustee had acted frivolously, and, by insisting upon the objection and obliging the executors to come to the Court, he had wasted the assets of the estate, and therefore he ordered the trustee to pay the costs personally. It cannot be denied that the judge had a discretion in this matter, but for the argument with which I will now deal.

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It is urged that, by s. 89 of the Bankruptcy Act, 1883, the trustee is to have regard to any directions that may be given by the committee of inspection; that the appellant was directed by

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the committee of inspection to reject the proof on this technical ground; and that, therefore, he ought not to be ordered to pay costs.

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That argument comes to this, that, if a committee of inspection direct a trustee to take a point and go to law about it, although the view of the committee may be frivolous and nonsensical to the last degree, yet the trustee is justified by their direction in spending the assets of the estate, and the judge has no discretion under such circumstances to make him pay costs. In my opinion that is not the meaning of the Act. Although the trustee is to have regard to the directions of the committee of inspection, he is not thereby justified in entering into litigation, or otherwise acting in a manner which the judge may properly consider to be vexatious and frivolous, and wasteful of the property which he has to administer. He is not justified in so acting, merely because a stupid committee of inspection, it may be at his own suggestion, have told him to do so, however honest he may be in the sense that he never meant to do anything for his own personal advantage. I cannot suppose that the appellant has acted dishonestly in that sense, but he has taken an unreasonable course, and he must abide by the consequences. We cannot overrule the exercise of the discretion of the judge, unless we are perfectly sure that he was wrong. So far from being satisfied that he was wrong, I am certain that he was right.

BOWEN, L.J. I also think that the order of Cave, J., is right. The proof was based, first, on a claim for a debt, and, secondly, on a judgment for that debt. The trustee, because the judgment was invalid by reason of certain of the formalities required by s. 27 of the Debtors Act, 1869, not having been observed, instead of rejecting so much of the proof as depended upon the judgment, and investigating the remainder of the claim, rejected the whole proof. That, as it seems to me, was monstrous. The failure to make the consent order a binding judgment at law did not destroy the original rights of the creditor. No Act of Parliament is so barbarous as to say that, because a man does not register a consent judgment properly, therefore all his former rights are swept away. All that s. 27 says is, that the judgment and any

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execution issued on it are to be void. But the trustee has attempted to do that which the Act has not done, viz., to put an end to the whole claim, simply because the consent order was not properly filed. If the judgment was to be treated as waste paper there might be merits behind, and that it was the duty of the trustee to discover. Of the merits I say nothing now, except so far as is necessary for the present decision; they will be dealt with hereafter. But the suggestion, that, because the committee of inspection chose to sanction the course which the trustee has adopted, therefore the Court cannot lay its hand upon him, I entirely repudiate, for it would place the Court at the mercy of the committee of inspection. When an utterly frivolous point has been persisted in, I feel no hesitation in saying that the trustee ought to pay the costs personally.

FRY, L.J. I am clearly of opinion that the trustee has not performed his duty in this case. His duty was to look into the merits of the claim. Instead of doing that he has thought fit to raise a technical objection, in order to shut out the claimants entirely. In so doing I think he has been guilty of misconduct, which it is competent to the Court to visit by making him pay costs personally. I do not believe that he intended to do anything dishonest in the sense of benefiting himself at the expense of the estate, but I think he took a thoroughly unreasonable course. In my opinion, the learned judge was perfectly right in requiring the trustee to pay the costs of the application. I think we ought to adopt the same course, and to reject this appeal with costs to be paid personally by the trustee, not out of the bankrupt's estate.

Appeal dismissed.

Solicitors for appellant: *Munns & Longden.*
Solicitors for respondents: *Law, Hussey & Hulbert.*

W. L. C.

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May 24, 25, 26.

[IN THE COURT OF APPEAL.]

CLARKE *v.* THE MILLWALL DOCK COMPANY.

Landlord and Tenant—Distress—Privilege from Distress—Things on the demised Premises to be dealt with in the way of Trade—Delivery for Trade Purposes, whether necessary in order to make Privilege apply.

Things belonging to a third person, which are on demised premises for the purpose of being wrought up or manufactured by the tenant in the way of his trade, are not privileged from distress by the landlord unless they have been sent or delivered by such third person to the tenant for that purpose.

Judgment of Pollock, B., affirmed.

APPEAL from a judgment of Pollock, B.

Claim for 1721*l.* as damages for the wrongful detention by the defendants of a ship called the *Swillington*, the property of the plaintiff as executor of W. France, deceased.

The defence in substance was that the defendants lawfully detained the ship upon premises occupied by one Gilbert as tenant to the defendants under a distress for arrears of rent due from him to them; that they detained the ship for a reasonable time until they were paid the sum of 1721*l.*, being the amount of arrears of rent, and then delivered it to the plaintiff and Gilbert.

The action was tried by Pollock, B., without a jury, at the Middlesex sittings in June, 1885, when the material facts proved in evidence, or admitted, were as follows:—

In 1882, Gilbert contracted to build for France a steamship according to certain specifications and models. The contract was contained in correspondence between the parties, and by the terms of it the price was to be 8000*l.*, to be paid by nine equal instalments, each instalment to become due as certain specified parts of the ship were completed.

Gilbert began the work about the end of November, 1882, in a dry dock occupied by him as tenant to the defendants.

France died on the 27th of August, 1883, and the plaintiff was the sole executor of his will.

On the 11th of September, 1883, the defendants seized the ship upon the premises let to Gilbert, under a distress for arrears of

rent, amounting to 1721*l.*, due from Gilbert to them in respect of his tenancy of the dry dock.

The ship was detained by the defendants under the distress until the 2nd of October, 1883, when the plaintiff paid the sum of 1721*l.* to the defendants under protest, in order to obtain the release of the ship, and the defendants thereupon gave up possession of the ship.

At the date of the execution of the warrant of distress, the ship was nearly completed, and France had paid all the instalments due under his contract with Gilbert as each part of the ship was built.

During the progress of the work the materials and things necessary to carry out the building of the ship were supplied to Gilbert by the various makers thereof, and no materials had been sent or delivered by France or the plaintiff to Gilbert to be used for the building of the ship.

On these facts, Pollock, B., gave judgment for the defendants, holding that the ship was not privileged from distress for rent at the time the defendants seized and detained it, and therefore that the detention was lawful.

The plaintiff appealed.

Finlay, Q.C. (*McCall*, with him), for the plaintiff. It is clear that under the contract between France and Gilbert the property in so much of the ship as was completed passed to France as each instalment was paid: *Ex parte Lambton, In re Lindsay* (1); *Clarke* v. *Spence*. (2) The ship was thereupon privileged from distress on Gilbert's premises, being within the rule stated in Coke upon Littleton, 47 a: "Valuable things shall not be distrained for rent for benefit and maintenance of trades, which by consequent are for the common wealth, and are there by authority of law; as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c., in the hostry; nor the materials in the weaver's shop for making of cloth, nor cloth nor garments in a tailor's shop, nor sacks of corn or meal in a mill, nor in a market, nor anything distrained for damage feasant, for it is in custody of the law, and the like." The

(1) Law Rep. 10 Ch. 405. (2) 4 Ad. & E. at p. 466.

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rule is also stated by Blackstone (3 Bl. Com., p. 8) thus: "Valuable things in the way of trade shall not be liable to distress, as a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house, or corn sent to a mill or a market, for all these are protected and privileged for the benefit of trade." The rule has been applied in many cases: *Simpson* v. *Hartopp* (1); *Muspratt* v. *Gregory* (2); *Wood* v. *Clarke* (3); *Gilman* v. *Elton* (4); *Thompson* v. *Mashiter*. (5) It is true that in *Simpson* v. *Hartopp* (1) Willes, C.J., in stating the second of the five sorts of things which at common law were not distrainable, gives this definition: "Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." But it is submitted that delivery of the goods is not an essential part of the rule. There is no such qualification of the rule in the statements of it by Coke and Blackstone. The exception in favour of trade from the general law of distress for rent should be extended rather than limited. It is anomalous and a hardship that one man's goods should be seized on the premises of another to pay that other's debt. The tendency of the decisions should be, on public grounds, to extend the exemptions from distress rather than to limit them: *Adams* v. *Grane*. (6) When a thing is manufactured for another, and the price has been paid by the person for whom it has been manufactured, the property passes to him; and if he allows it to remain on the premises of the manufacturer for the purpose of having some alteration made in it, it could hardly be contended that the thing manufactured was liable to distress for rent by the landlord of the premises. Yet in such a case there would be no sending or delivery by the person for whom the thing was made. It is contended that the element of delivery is not essential in all cases. It is enough to render goods privileged from distress if they are upon the premises of a person who is not the owner for the purpose of being dealt with in the way of trade.

(1) Willes, 512; 1 Smith's Leading Cases, 8th ed., 450.
(2) 1 M. & W. 633; 3 M. & W. 677.
(3) 1 C. & J. 484.
(4) 3 B. & B. 75.
(5) 1 Bing. 283.
(6) 1 Cr. & M. 380; 3 Tyrw. 326.

[He also referred to *Miles* v. *Furber* (1); *Parsons* v. *Gingell* (2); *Woods* v. *Russell* (3); *Atkinson* v. *Bell* (4); *Holderness* v. *Rankin.* (5)]

Cohen, Q.C., and *W. Graham*, for the defendants. It is contended that on the true construction of the contract between France and Gilbert the property in this ship had not passed to France or the plaintiff when the defendants' distress was put in. But if it had, the ship was not privileged from distress, because the case has not been brought within any of the established exceptions to the general rule of law that goods on the demised premises are liable to distress for rent whether they are the property of the tenant or not. It is for the plaintiff to shew that the materials for making the ship were delivered to Gilbert to be wrought or manufactured in the way of his trade. The exception is in favour of trade and commerce, and it is founded upon the view that public trade would suffer if persons were prevented from sending their goods to be wrought or manufactured on the premises of others by reason of the goods being subject to distress for rent. Here there was no delivery of the goods, nor any equivalent for delivery. The mere fact that goods on the demised premises do not belong to the tenant does not exempt them from distress. Thus where a carriage is bought in a shop, if the purchaser leaves it there it is subject to distress for the rent of the shop. The rule laid down by Willes, C.J., in *Simpson* v. *Hartopp* (6) ought not to be extended in the way suggested by the argument for the plaintiff.

[He also cited *Muspratt* v. *Gregory* (7); *Gisbourn* v. *Hurst* (8); *Joule* v. *Jackson.* (9)]

Finlay, Q.C., replied.

LORD HERSCHELL, L.C. The sole question in this case is whether an unfinished ship, which was being built for the plaintiff in a dry dock rented by the builder from the defendants, was or was not exempt from distress for rent. The defendants distrained

(1) Law Rep. 8 Q. B. 77.
(2) 4 C. B. 545.
(3) 5 B. & A. 942.
(4) 8 B. & C. 277.
(5) 2 De G. F. & J. 258.
(6) Willes, 512; 1 Smith's Leading Cases, 8th ed., 450.
(7) 1 M. & W. 633; 3 M. & W. 677.
(8) 1 Salk. 249.
(9) 7 M. & W. 450.

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the ship, and the plaintiff alleges that the distress was unlawful because the property was in him, and the circumstances were such as to exempt the ship from distress. There is no question that, primâ facie, all goods found on the demised premises are subject to distress, but it is said that this case comes within one of the exceptions which have been engrafted on the general law. The facts are that Gilbert, having rented the dry dock from the defendants, entered into a contract with the plaintiff's testator to build for him this ship; the price was to be paid in equal instalments, each instalment becoming due as certain portions of the ship were completed. The instalments due had been paid, and the work was approaching completion. It is not necessary to decide whether, when the instalments were paid, the property in the ship passed to the plaintiff, though the case of *Clarke* v. *Spence* (1) certainly affords strong ground for saying that it did pass. Assuming that it did, it is, at least, equally clear from the same case that Gilbert was entitled to retain the ship for the purpose of finishing it and earning the remaining instalments. The exception which is said to apply here is that described in the 2nd rule stated by Willes, C.J., in *Simpson* v. *Hartopp.* (2) That rule had been laid down in substantially the same terms in *Gisbourn* v. *Hurst.* (3) It was repeated in *Muspratt* v. *Gregory* (4), and has been acted upon in many other cases. Assuming that, as I have said, the property in the ship was in the plaintiff when the distress was made, the case is one of property belonging to another being on the demised premises, and so far, therefore, within the rule. I agree also that the ship was on Gilbert's premises for the purpose of being "wrought, worked up, or managed in the way of his trade or employ." But it is contended by the defendants that, though on Gilbert's premises for these purposes, there was no thing delivered to him within the meaning of the exception. On the other hand it is said that there need not be a delivery; that it is enough if the goods are on the premises for the purpose of being wrought and worked up; and that when the principle is looked at upon which the exception is

(1) 4 A. & E. 448.

(2) Willes, 512; 1 Smith's Leading Cases, 8th ed., 450.

(3) 1 Salk. 249.

(4) 1 M. & W. 633; 3 M. & W. 677.

founded, it does not necessarily involve the idea of delivery. But I am of opinion that we are limited in this case by the strict terms of the exception. It is very difficult to find any sound principle upon which to explain the law of distress and to support the various decisions. No doubt the general law which enables a landlord to distrain the goods of a third person upon the tenant's premises is, as was said in argument, anomalous, and the exception in question is also anomalous. I think that we cannot go beyond the terms of the definition of the exception. There have been many cases in which the Courts would be disposed to go beyond those terms, as in *Wood* v. *Clarke* (1), but in that case it was held that, though materials delivered by a manufacturer to a weaver to be manufactured by him on his own premises were privileged from distress, a frame delivered with the materials to be used in the manufacture was not privileged, unless there was otherwise a sufficient distress upon the premises, because it did not come within the terms of the exception. Looking at the terms of the exception it is as much a necessary part of it that the goods should be delivered for the purposes of being wrought, worked up, or managed in the way of the trade, as that they should be on the demised premises for those purposes. There is no more reason for rejecting the term "delivered" from the exception than there is for rejecting the terms with respect to the goods being on the demised premises to be wrought, &c., in the way of trade. I am of opinion that the exemption must be limited to cases in which there has been a delivery for the purposes of trade, and that it does not extend to all cases in which goods are on the premises for those purposes. If we might consider the question of principle, delivery of the goods for the purposes of trade may be essential, because the exception was probably founded on the view that where a person having the right to possession parts with the possession and entrusts his goods to another for the purposes specified in the exception, and by parting with the possession renders the goods physically subject to seizure upon that other's premises, the goods ought not to be thereby rendered liable at law to distress.

I do not mean to decide that that is the principle, but it may

(1) 1 C. & J. 484.

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as well be that as any other principle. It is sufficient here to say that we cannot reject the word "delivered" in applying the exception. It was said, on behalf of the plaintiff, that the term "delivered" is not found in the exception as stated by Coke (Coke, Litt. 47 a.) and Blackstone (3 Bl. Com. 8), and in some of the older authorities. True; but both in Coke and Blackstone the exception is stated in terms so large as to include cases with respect to which a course of decisions has established that the goods are not privileged from distress; and all the illustrations given by Coke and Blackstone of cases within the exception imply the idea of delivery of the goods for the specified purposes. In the present case there was no delivery in any sense of the term. The goods were originally in the possession of Gilbert for the purpose of building the ship; they remained in his possession until the first instalment was paid, and up to that time were liable to distress for rent owing to his landlord. After the first instalment was paid the possession remained in Gilbert, and France and the plaintiff, as his executor, had only the property in them. That being so, can it be said that, giving the widest interpretation to the term "delivered," there was any delivery here within the meaning of the exception? I think the facts dispose of the suggestion that there was any such delivery. As to the illustrations put in argument, when an article is delivered to be repaired or altered the privilege of the exception would clearly apply, and where a carriage is built for a purchaser, and when it has been completed and paid for, the purchaser allows it to remain on the builder's premises for the purpose of having some alteration made, I will not say that those facts might not constitute a delivery within the meaning of the exception, because the purchaser having the right to possession has entrusted the possession to the builder for the purpose of altering the carriage. Here the purchaser of the ship never had the right to possession at any time. He had the property in the ship, but the possession always remained with Gilbert.

I arrive at my conclusion in this case with some regret, but the exception has been laid down in these terms and acted upon for so many years that it is impossible now to extend it by judicial construction. If extended it must be by the interference of the

legislature. For these reasons I am of opinion that the decision of Pollock, B., was right, and must be affirmed.

LORD ESHER, M.R. The law with respect to goods privileged from distress is part of the common law. It has been stated over and over again, and is fixed by the judgment of Willes, C.J., in *Simpson* v. *Hartopp.* (1) That learned judge's statement of the law was made after very careful consideration, and has always been accepted as true and correct. He laid down five exceptions to the general law in the form of rules. Some of those rules apply to goods which are the property of the person upon whose premises a distress is made. The rule in question applies to goods which are the property, not of the person upon whose premises the distress is made, but of another, and it is in these terms: "Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ." Afterwards in the same judgment, the Chief Justice stated the rule again, and pointed out the reason for it, thus: "Things sent or delivered to a person exercising a trade to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to be made up, are privileged for the sake of trade or commerce, which could not be carried on if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are." Now all the exceptions are stated in the form of rules, not of principles, and that distinction was upheld by the Court of Exchequer Chamber in *Muspratt* v *Gregory* (2), where the Court was asked to find that they were principles but refused to do so. The rule in question is stated to be "for the sake of trade and commerce." If that reason, contained in the rule itself, as stated by Willes, C.J., be the real reason for the rule, I think it is absolutely necessary to say that the words "sent or delivered" form an essential part of it. It is the principal essence of the rule, contained in the first part of it, and founded upon the idea that a man would not

(1) Willes, 512; 1 Smith's Leading Cases, 8th ed., 450.

(2) 1 M. & W. 633; 3 M. & W. 677.

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send or deliver goods if they were liable to be distrained upon. They are to be sent by a person whose property they are, and they are to be sent to a person exercising a trade to be wrought, &c., "in the way of his trade or employ." If something is delivered which it is not part of his trade or employment to deal with, the thing delivered is not privileged from distress. The case was put in argument of goods not sent or delivered but manufactured into some article upon the tenant's premises, and it was said that under certain circumstances there might be something equivalent to delivery within the meaning of the rule. I should say that is true, if the article to be manufactured has been completed, and the person who has the property in it leaves it upon the demised premises in order to have some alteration made, because the law would not require him to go through the idle ceremony of taking the article away and returning it. In such a case I think there would be an equivalent to delivery of the thing manufactured. Here nothing was sent or delivered in any sense. I will assume, as the Lord Chancellor has done, that the property in the ship passed to the plaintiff or his testator when the instalments of the price were paid, but it is a necessary implication from the contract that the shipbuilder had the right to possession, and the plaintiff had no such right, until the ship was completed. The plaintiff never had possession of the ship in fact; he never sent or delivered it to Gilbert, and there was nothing in the transaction between them equivalent to sending or delivering. I am therefore of opinion that the rule does not apply to this case, and that the ship was not privileged from distress under the circumstances.

FRY, L.J. I am of the same opinion. The statement of the rule in *Gisbourn* v. *Hurst* (1) was accepted in *Simpson* v. *Hartopp* (2), which has ever since been the leading case on the subject, and all the illustrations of that rule involve the idea of sending or delivery of some article to the person on whose premises the distress is made. I am of opinion that we are not at liberty to depart from that rule, which was also accepted as a

(1) 1 Salk. 249. (2) Willes, 512; 1 Smith's Leading Cases, 8th ed., 450.

binding exposition of the law in the year 1838, in *Muspratt* v. *Gregory*. (1) It is to be observed that in all the cases to which the rule has been applied there was, in fact, a sending or delivery. In *Muspratt* v. *Gregory* (1) the Court clearly thought that sending or delivery was an important part of the rule; and it is impossible not to see that sending or delivery is important in considering the question of principle. The rule would be greatly enlarged if the words "sent or delivered" were struck out, because, as it stands, the rule only applies where the right to possession in the goods has been in the person for whom they are being wrought or manufactured. I assume that the property was in the plaintiff in this case, but in order to make the rule apply, I think both the property and the right to possession should be in a person who delivers the goods for the purpose of having them wrought, &c. in the way of trade. There is no pretence for saying that the plaintiff was entitled to possession of the ship in question here. There may, perhaps, be cases in which a constructive delivery would be sufficient, but here there was no equivalent for actual delivery. I am of opinion that the defendants are entitled to our judgment.

Appeal dismissed.

Solicitors for plaintiff: *Eyre & Co., for Clarke & Son, Leeds.*
Solicitors for defendants: *Blunt, Tebbs, & Lawford.*

(1) 1 M. & W. 633; 3 M. & W. 677.

W. A.

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May 17, 18, 21;
June 11.

[IN THE COURT OF APPEAL.]

HARRIS *v.* BRISCO.

"Maintenance," Action for—Grounds of Defence—Charity.

An action will lie to recover damages caused to the plaintiff by the defendant's "maintenance" of a third person in legal proceedings between him and the plaintiff.

To such an action it is a good defence that the defendant assisted the third person from charitable motives, believing that he was a poor man oppressed by a rich man. It is not necessary that the defendant should have acted after full inquiry into the circumstances, but the defence will be equally available even if the defendant, had he made full inquiry, would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted.

Judgment of Wills, J., reversed.

APPEAL from the judgment of Wills, J., at the trial of the action.

The action was brought to recover damages occasioned to the plaintiff by reason of the defendant's "maintenance" of one Nailer in an action which he had brought against the plaintiff. Nailer was entitled to the equity of redemption of a farm which was mortgaged to the plaintiff, and which was occupied by Nailer. Nailer sold his equity of redemption to the plaintiff, who, after the sale, allowed Nailer to remain in occupation for some time, but ultimately turned him out. Nailer then brought an action against the plaintiff for the redemption of the farm. In this action Nailer was aided and maintained by the defendant. The plaintiff set up the assignment of the equity of redemption to him, and Nailer then alleged that he had never executed the assignment, and that, if he had, his execution of it had been obtained by the fraud of the plaintiff. Nailer failed in this action, and it was dismissed with costs, which were taxed at 118*l.* Nailer, who was a pauper, failed to pay these costs, and the present action was brought by the plaintiff against the defendant to recover the 118*l.*, on the ground that he had "maintained" Nailer in the former action. The defendant's principal defence was, that he had maintained Nailer from motives of pure charity, believing that he was oppressed by the plaintiff, and that he was without the means of obtaining redress.

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The action was tried by Wills, J., without a jury, at Reading, on the 11th and 12th of January, 1886.

Underhill, Q.C., and *Harry Nash*, for the plaintiff.
Jelf, Q.C., for the defendant.

WILLS, J. The plaintiff sues the defendant for having committed the offence known by the law as "maintenance," that is, in popular language, he charges the defendant that, without reasonable or probable cause, and without justifiable excuse, he encouraged a person, whom he knew to be utterly unable to pay the costs of a litigation if it should be unsuccessful, to engage in that litigation and to carry it on against the present plaintiff, the consequence of which was that he put the plaintiff to an expense of over 100*l.* The plaintiff says that the defendant, having done that, is liable to recoup him that loss. No doubt an action for maintenance is very seldom resorted to, and it has been suggested that the ancient law, that for misconduct of this kind a defendant may be made liable in damages, has now been altered. But a very short time ago, in *Bradlaugh* v. *Newdegate* (1), this very question was raised, and Lord Coleridge, C.J., in a considered judgment, expressed his opinion that this old law is unaltered, and moreover that it is a beneficial law, which may in some cases afford the only remedy for a very grievous wrong. Independently of that decision I should have felt no difficulty in coming to the same conclusion. As it is, I have only to follow the judgment in *Bradlaugh* v. *Newdegate* (1), which has not been appealed from.

The question therefore is, under what circumstances is an action of this kind maintainable? It is extremely difficult to lay down any quite satisfactory rule with regard to a matter of this kind, as to which there is not much to be found in our modern law books. But this much appears to me to be the fair result of the judgment in *Bradlaugh* v. *Newdegate* (1), that for a stranger to a litigation to embark in it and make it his own is primâ facie unlawful, and that such conduct requires explanation and justification in order to render it lawful. There is good reason for this, for, if unlimited licence was allowed to litigious

(1) 11 Q. B. D. 1.

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and cantankerous people, who rejoice in stirring up strife, and to whom an atmosphere of litigation is as the breath of life (and there are such people in the world), to make other people's quarrels their own, and to take the chance of success without incurring the liabilities of failure, a great many persons would be harassed and vexed by unjust and improper litigation. Therefore the law has wisely imposed some check upon the indulgence of such a disposition. In order to justify interference of this kind to the prejudice of another person it seems to me essential either that the person who interferes should himself have some interest in the subject-matter of the litigation, or that where, as in the present case, he has no interest whatever in the subject matter, he should, at all events, have some sort of reasonable ground for his interference. Of course he must shew that he is acting bonâ fide, in the belief that the person whom he favours at the expense of another has a well founded claim against that other. But it seems to me that it is necessary, not merely that he should have that belief, but that he should have some reasonable ground for his belief. I do not mean that he is bound to exercise the utmost care or to use the utmost discretion in his interference, but, making every possible allowance for the workings of a generous mind in favour of the particular person whom he believes to be oppressed, it seems to me that he ought not to indulge that species of charity at the expense of another person who may be equally innocent, and who ought to be equally the subject of his benevolent consideration, unless he has some reasonable ground for his belief that he is furthering the cause of justice, and supporting the oppressed against the oppressor, and the mere fact that he, upon imperfect information, which he has taken no trouble to check or verify, has formed an opinion favourable to the one party and unfavourable to the other, is not sufficient to justify him in interfering in a quarrel with which he has nothing to do to the prejudice of a third person.

It seems to me that the facts of the present case are such as to relieve me from all serious difficulty, because they fall very far short of what any reasonably fair-minded man would consider a justification for the defendant's conduct. Whatever test be adopted, I cannot doubt that his interference was unjustifiable

and illegal. [The learned judge reviewed the evidence, and continued:—] One would have supposed that, when a man, who has nothing whatever to do with the subject-matter of a litigation, constitutes himself so far the judge between the parties as to say that one of them is deserving of immediate sympathy and immediate help against the other, in a fashion which may be very disastrous to the latter, he would, at all events, take some pains to learn who the people are, one of whom is alleged to have been cheated by the other. The defendant, however, made no inquiry as to the character of either of the parties, though a very small amount of inquiry and a very little trouble would have satisfied him that Nailer's antecedents were not such as he was entitled to rely upon implicitly, and that any statements which came from him ought to be received with caution. To make a charge of fraud, and to encourage in making it a person who is unable to pay the expenses of the litigation, without the slightest inquiry, is, in my opinion, rash, reckless, and unreasonable in the highest degree, and I trust that such conduct will never meet with any sympathy at the hands of any tribunal which has to deal with it. It seems to me impossible for a person who so acts to take credit to himself afterwards for such charitable and benevolent motives as will relieve him from the natural consequences of unjustified interference in a quarrel which does not belong to him. The defendant, as it seems to me, had nothing to go upon beyond the vaguest and slenderest suspicion.

Whatever may be the accurate definition of the offence or illegal act known as "maintenance," it seems to me that the defendant's conduct must fall within any possible definition of it, and I think that he is rightly subjected to the consequences of having encouraged Nailer to bring the former action, and of having supplied him with the means of doing so. In fact he himself brought the action in Nailer's name, gave instructions to his own solicitor, and took very good care not to advance money to Nailer (if he had, I suppose, very little of the money would have gone into the pocket of the solicitor who was carrying on the litigation), but he carried on the litigation himself. Therefore, my judgment must be against the defendant for the sum claimed, with costs.

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The defendant appealed.

Jelf, Q.C., and *Ruegg*, for the defendant. An action for "maintenance" will not now lie, whatever may have been the law in former times. The decision in *Bradlaugh* v. *Newdegate* (1) that such an action is maintainable, is not binding on this Court, and the present appeal is in effect an appeal from that decision. But, if such an action will lie, the fact that the defendant, in maintaining Nailer, was acting from charitable motives is a good defence. It is not necessary to shew that there was reasonable or probable ground for bringing the former action; it is enough to shew that the present defendant believed that the plaintiff in the former action was a poor man oppressed by a rich man, and unable by reason of his poverty to defend himself against that oppression, and that, acting upon that belief, the present defendant assisted Nailer with money to enable him to carry on the former action. In order to succeed in the present action the plaintiff is bound to shew that the defendant acted maliciously in aiding Nailer—that he had a mens rea: *Findon* v. *Parker* (2); Hawkins' Pleas of Crown, 8th ed., vol. i., p. 460; *Hutley* v. *Hutley* (3); *Metropolitan Bank* v. *Pooley*. (4)

Underhill, Q.C., and *Harry Nash*, for the plaintiff. The action is clearly maintainable. *Bradlaugh* v. *Newdegate* (1) shews that it is, and that decision is in conformity with many older ones. It is not necessary to shew that the defendant had a mens rea. It is sufficient that there was no reasonable or probable ground for bringing the former action, and that the defendant acted recklessly in assisting Nailer without proper inquiry into the truth of his case. Reckless charity of this kind is not a defence to the present action; it is not charity within the meaning of the authorities which say that charitable motives are a good excuse for aiding a stranger in carrying on legal proceedings against another person: *Rothewel* v. *Pewer* (5); *Pomeroy* v. *Abbot of Buckfast* (6); *Anon.* (7); Brooke's Abridgment, tit. "Maintenance"; Viner's

(1) 11 Q. B. D. 1.
(2) 11 M. & W. 675.
(3) Law Rep. 8 Q. B. 112.
(4) 10 App. Cas. 210.
(5) Y. B 9 Hen. 6, p. 64.
(6) Y. B. 21 Hen. 6, p. 15.
(7) Y. B. 22 Hen. 6, p. 35.

Abridgment, tit. "Maintenance." The old cases speak of giving money to a poor man "to maintain" his plea; that is applicable rather to the defendant in an action than to a plaintiff—to a man who is assailed by legal proceedings than to a man who commences them, and in most of the cases the person who was "maintained" was a defendant. There is no case to be found in which the defence of charity was actually raised with success to an action for maintenance; there are only dicta that charity would be a defence. Charity is not mentioned as a defence or exception in either Comyns' Digest or Fisher's Digest. The view taken by the judges in former days may have been very reasonable then, but it does not follow that it is reasonable now. Under the present Rules of Court great facilities are given to a poor man to sue in formâ pauperis. The mere allegation of charitable motives is not a good defence; reckless charity without reasonable probable cause is no justification. It is not true charity to help a man because he is poor, without any regard to the interests of his antagonist; charity should be shewn to him also.

[BOWEN, L.J. Suppose the question, whether there was reasonable or probable cause for bringing the first action, depended on a difficult point of law?]

Then the person who wished to aid the plaintiff ought before doing so to take the opinion of counsel.

The Court of Appeal will not interfere with the judge's finding on the facts against the defendant on the question of charity. In an action of this kind it is sufficient to allege generally that the defendant has maintained the third person; no allegation of malice is required: Plowden's Commentaries, p. 51 b.; Bacon's Abridgment, vol. v., p. 253.

Jelf, Q.C., in reply. This is an action of a highly penal character, and the Court will not now extend the definition of maintenance. The statutes 1 Ric. 2, c. 4, and 32 Hen. 8, c. 9, provide a statutory punishment for the offence of maintenance, and they have not been repealed.

The question is, who may lawfully spend money in bringing an action? A plaintiff himself is entitled to bring an action,

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however unreasonable and reckless he may be in doing so; the law does not take cognizance of that as an offence. But a third party who intermeddles with litigation which does not concern him is guilty of "maintenance." There are, however, several recognised excuses, such as the relationship of father and son, or that of master and servant. The charitable motive of assisting a poor man who is oppressed is also an excuse. The essential point is whether the person aided is a poor man. In modern times the stringency of the old common law as to "maintenance" has been relaxed: *Master* v. *Miller*. (1)

Cur. adv. vult.

June 11. FRY, L.J., delivered the judgment of the Court (Lord Esher, M.R., and Bowen and Fry, L.JJ.) as follows:—

This is an appeal from a judgment of Wills, J., by which the plaintiff recovered from the defendant Brisco a sum of 118*l*., and costs.

The action was one for maintenance, and the short facts are these:—

One William Nailer and his brother Charles Nailer were owners in fee in equal moieties of a small farm. This had been mortgaged for 1000*l*. Charles Nailer sold to the plaintiff Harris his equity of redemption in his moiety for 25*l*. William Nailer obtained advances from Harris. Harris took an assignment of the mortgage for 1000*l*., and subsequently purchased from William Nailer his equity of redemption in his moiety for 40*l*. Harris allowed William Nailer for a time to occupy the farm, and then turned him out. Nailer considered himself aggrieved, and brought an action in the Chancery Division against Harris for the redemption of the farm. In this action Nailer was aided and abetted by Brisco. Harris set up the assignment of the equity of redemption, and thereupon Nailer by amendment denied that he had executed any conveyance of his equity of redemption, and alleged that, if he had executed any such conveyance, his execution was procured by fraud. This action was tried before Kay, J., when the plaintiff Nailer entirely failed, and his action was

(1) 4 T. R. at p. 340.

dismissed, with costs to be paid by Nailer. Harris's costs were taxed at the sum of 113*l.* 0*s.* 4*d.*, which sum, Nailer being a pauper, has never been paid. Harris has brought the present action to recover this sum of 113*l.* 0*s.* 4*d.*, together with 5*l.* for personal costs, from Brisco, as having maintained Nailer in his redemption action. Wills, J., has held that the plaintiff has proved his case, and from his judgment the defendant Brisco has appealed.

On this appeal many points have been urged.

The defendant's counsel have, in the first place, contended that no such action will lie. On principle this contention appears untenable, for maintenance is an unlawful act, and, when an unlawful act results in a particular wrong to a particular person, our law, generally speaking, gives to such person a remedy by action against the wrongdoer. But it is hardly necessary to resort to principle, for the point is well covered by authority.

The law writers of the age of Elizabeth refer to the action in question as a well known one. Theloall, in his Digest des Briefes (lib. 2, cap. 12, fo. 59), states a case in which three plaintiffs may be joined in a brief in maintenance, and Rastall, in his Entrees, under the head "Maintenance," gives a form of a count in such an action. Lord Coke, 2 Inst. 208, is equally clear. "An action of maintenance did lie at the common law," he says, in commenting on the statute of Westminster the First, which on this point was declaratory of the common law. Comyns' Digest (title Maintenance, c. 1) is to the like effect. Les Termes de la Ley, p. 422, after defining maintenance, adds: "The party grieved shall have against him" (that is, the wrongdoer) "a writ, called a writ of maintenance." Lord Loughborough, in 1797, in *Wallis* v. *Duke of Portland* (1), in like manner declared that such an action would lie at common law. In *Pechell* v. *Watson* (2) the Court of Exchequer seem to have entertained no doubt as to the existence of such an action; and, lastly, in *Bradlaugh* v. *Newdegate* (3), Lord Coleridge, C.J., upheld the action. In the face of this long chain of authorities the defendant's argument on this point is utterly untenable.

(1) 3 Ves. 502. (2) 8 M. & W. 691.

(3) 11 Q. B. D. 1.

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Fry, L.J.

In the next place, the defendant alleges that he aided and maintained Nailer out of charity, and that charity is an answer to an action of maintenance. Now the facts of the case, as found by Wills, J., appear to us to be shortly, that the defendant Brisco aided Nailer out of charity, and because he believed him to be oppressed by Harris, but that in fact Nailer was not oppressed by Harris, and had no cause of action against him, and that Brisco took no reasonable pains to make inquiry into the real facts of the case, or to ascertain those facts, and that, if he had acted as a reasonable man, he would never have aided Nailer in an action, and thereby put Harris, not only to the anxiety and trouble of being defendant in the action, but to the loss of his costs from the poverty of Nailer; and Wills, J., has held, as a matter of law, that the mere desire to benefit Nailer is not a defence to the present action, "unless the defendant had some reasonable ground for his belief that he was furthering the cause of justice and supporting the oppressed against the oppressor."

To the view taken by Wills, J., of the facts we entirely assent, but upon these facts two questions of law arise which have been argued before us, viz.: First, Is charity a defence to an action for maintenance? Secondly, Is thoughtless and inconsiderate kindness towards a particular person charity within the meaning of the defence, if such defence there be?

The doctrine that charity is an excuse for maintenance seems first to have found expression in our law in the case of *Rothewel* v. *Pewer* (1), in the course of which Martin, Justice of the Common Pleas, said: "I can give gold or silver to a man that is poor to maintain his plea, if he himself cannot through his poverty: this is not maintenance against the law"; and in *Power* or *Pomeroy* v. *Abbot of Buckfast* (2), Paston, a judge of the Common Pleas, said (3): "Suppose that I of my charity give a sum of money to a poor man who has a suit, in order to aid him in the suit; it is no maintenance: no more is it in the case at the bar." Again, in 22 Hen. 6, p. 35, Prisot, Serjeant, who appears to have been counsel in the case, observed "that in writ of maintenance it is a good plea that he who is supposed to have been maintained is

(1) Y. B. 9 Hen. 6, p. 64. (2) Y. B. 21 Hen. 6, p. 15.
(3) Y. B. 21 Hen. 6, p. 16.

a poor man, and had no means to defend himself in the suit which the plaintiff had against him, and that the said new defendant of his alms gave him 20s., which is the same maintenance alleged."

These authorities found, as might be expected, their place in the Abridgements of Brooke and Rolle, and the result of them appears in Hawkins' Pleas of the Crown, 8th ed., vol. i., p. 460, in the statement that "it seems to be agreed that any one may lawfully give money to a poor man to enable him to carry on his suit," and in Blackstone's Commentaries, vol. iv., p. 134, in the words, "A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour out of charity and compassion with impunity." Similar statements are to be found in Viner's and Bacon's Abridgements, tit. "Maintenance."

It is, no doubt, remarkable that no case can be found in our law books in which the defence of charity has been actually raised to a proceeding for maintenance. But the proposition, that charity is a good defence, was asserted by the judges as well known and understood law more than four hundred years ago, when the law of maintenance was more familiar than it is now, and it has been adopted and accepted by the compilers of the digests to which we are accustomed to look for guidance, and upon this proposition no judge, counsel, or writer has, so far as we can learn, thrown any doubt. We hold that the proposition is part of the law of England.

But, if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word "charity" by Wills, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interest of the supposed oppressor, as well as of the supposed victim, and shall act only after due inquiry and upon reasonable and probable cause. If we were making new law and not declaring old law it would, in our opinion, be well worthy of consideration whether such a limitation of the doctrine that charity is an excuse for maintenance would not be wise and good. But is it not an anachronism to suppose any such view of charity to have been present to the minds of the judges of the reign of Henry VI.?—a view which

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even now is present to the minds only of a select few, and does not commend itself to a large proportion of the kind-hearted and charitable amongst mankind? To say that charity is not charity unless it be discreet, appears to us without foundation in law. Of this limitation on the word "charity" no trace can be found in any of the authorities which have been cited, and, furthermore, in the other exceptions to the law of maintenance, such as those arising from the relations between lord and tenant, master and servant, neighbour and neighbour, there appears, so far as we can learn, to be no case or dictum in the books in which the duty of making inquiry, or of acting only on reasonable and probable grounds, has been recognised as a limitation of the right of giving assistance.

For these reasons, but not without regret, we differ from Wills, J., and think that his judgment must be reversed, and the action dismissed with costs here and below.

Appeal allowed.

Solicitor for plaintiff: *R. T. Webster.*

Solicitor for defendant: *R. A. Biale.*

W. L. C.

July, 27, 28.

OSBORNE *v.* MILMAN.

Prison—Committal to, of Unqualified Person acting as Solicitor—Treatment in Prison—"Criminal Prisoner," Meaning of—Solicitors Acts (6 & 7 *Vict. c.* 73), *ss.* 2, 32, (23 & 24 *Vict. c.* 127), *s.* 26—*Prison Acts* (28 & 29 *Vict. c.* 126), *ss.* 4, 67, (40 & 41 *Vict. c.* 21), *s.* 41.

A person committed to prison under 6 & 7 Vict. c. 73, s. 32, and 23 & 24 Vict. c. 127, s. 26, for acting as a solicitor though not duly qualified, is not a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4, which enacts that "criminal prisoner shall mean any prisoner charged with or convicted of a crime." Such a prisoner is a person imprisoned under a rule or order of Court within 40 & 41 Vict. c. 21, s. 41, and is therefore entitled to be treated as a misdemeanant of the first division pursuant to 28 & 29 Vict. c. 126, s. 67, which provides that such a misdemeanant shall not be deemed to be a criminal prisoner within the meaning of that Act.

ACTION tried by Denman, J.

The plaintiff was committed to goal for six months by an order of the Queen's Bench Division made under 6 & 7 Vict. c. 73, ss. 2

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and 32, and 23 & 24 Vict. c. 127, s. 26, for having practised as a solicitor though not duly qualified. He was accordingly arrested and conveyed to Holloway gaol, of which the defendant was governor, and was there placed on the criminal side and treated as a convicted criminal not sentenced to hard labour. He contended that he ought to have been treated as a misdemeanant of the first division, and sued the defendant for damages for false imprisonment and trespass, and for having been, as was admitted, subjected to labour which, though not technically hard labour, was labour to which he would not have been subjected had he not been placed on the criminal side of the prison. A sum of 50*l.* was fixed as the sum for which the plaintiff was to have judgment if he were entitled by law to recover any damages at all.

Wildey Wright, and *Richards*, for the plaintiff. The plaintiff was not a person convicted of a crime, the offence for which he was committed is not a criminal offence, it is contempt of Court, or an offence in the nature of contempt of Court. He ought not therefore to have been treated as a convicted criminal prisoner not sentenced to hard labour. By 6 & 7 Vict. c. 73, s. 2 (1), no person is to act as a solicitor unless duly qualified. That section attaches no penalty to a violation of its provisions, so that until

(1) 6 & 7 Vict. c. 73, enacts in s. 2, that "no person shall act as an attorney or solicitor" unless such person shall have been duly qualified, and in s. 32 that if any solicitor shall wilfully and knowingly act as agent in any action or suit in any Court for any person not duly qualified to act as a solicitor, or permit his name to be used in any such action or suit, or do any other act to enable any such unqualified person to appear, act, or practise in any respect as a solicitor, then on complaint made in a summary way to any of the superior courts wherein such attorney or solicitor has been admitted, and proof, every such solicitor so offending shall and may be struck off the roll, and in that case "it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court for any term not exceeding one year."

Sect. 35 makes it contempt of Court for an unqualified person to sue out in his own name or in the name of any other person any writ or process, or to commence, prosecute or defend any action, suit, or proceedings in any superior court.

Sect. 36 contains a similar enactment relating to proceedings in county courts.

These two sections are repealed by the Statute Law Revision Act, 1874, 37 & 38 Vict. c. 96.

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the Amending Act, 23 & 24 Vict. c. 127 (1) was passed, which by s. 26 imposes a penalty on a person acting in contravention of s. 2 of the earlier Act, the only mode of proceeding against such a person would have been by indictment: *Reg.* v. *Buchanan.* (2) Sect. 32 of 6 & 7 Vict. c. 73, the section under which the order against the plaintiff was made, authorizes the Court to commit "to the prison of the said Court" for one year any unqualified person acting as a solicitor through another person, though that person is duly qualified. The prison of the Queen's Bench to which such a person was to be committed never was a criminal prison. A criminal prisoner is defined by 28 & 29 Vict. c. 126, s. 4, as "any prisoner charged with or convicted of a crime," and s. 67 of that Act enacts that prisoners convicted of misdemeanor and not sentenced to hard labour are to be divided into two divisions, and a misdemeanant of the first division "shall not be deemed to be a criminal prisoner within the meaning of this Act." 40 & 41 Vict. c. 21, s. 41, enacts that "any person who shall be imprisoned under any rule, order, or attachment for contempt of any Court" shall be treated as a misdemeanant of the first division within the meaning of 28 & 29 Vict. c. 127, s. 67, while s. 26 provides for the confinement of debtors and prisoners who are not criminal prisoners, and s. 38 has reference to prisoners imprisoned for non-compliance with orders of justices. Rules providing for the treatment of misdemeanants of the first division have been made, and those rules apply to a prisoner like the plaintiff. (3) There is, therefore, a distinction between convicted

(1) 23 & 24 Vict. c. 127, enacts by s. 26 that every person who acts as attorney or solicitor contrary to the enactment in 6 & 7 Vict. c. 73, s. 2, without being qualified "shall be deemed guilty of a contempt of the Court in which the action, cause, suit, matter or proceeding in relation to which he so acts is brought, had, or taken, and may be punished accordingly." It also prevents him from recovering any fees, and imposes a penalty of fifty pounds.

(2) 8 Q. B. 883.

(3) Rule 24 of the Prison Rules, 1878, made under the Prisons Act, 1877 (40 & 41 Vict. c. 21), is as follows:

"The foregoing rules relating to misdemeanants of the first division shall (to the exclusion of any other rules applicable exclusively to any particular class of prisoners) apply also to (*a*) any prisoner committed under any rule, order, or attachment for contempt of Court."

criminal prisoners and persons committed to prison for other causes. The plaintiff has never been convicted, he has been imprisoned under an order within 40 & 41 Vict. c. 21, s. 41.

Sir C. Russell, A.G., and *R. S. Wright*, for the defendant. The plaintiff was a convicted criminal prisoner. A crime is the commission of an act in violation of a public law forbidding it, or it may be described as an act or omission for which legal punishment may be inflicted: 4 Black. Com. 5; Stephen's Summary of Criminal Law, p. 1; Stephen's Digest of Criminal Law, p. 8; Stephen's History of Criminal Law, p. 1; Wharton's Law Lexicon, tit. Crime. If 6 & 7 Vict. c. 73, had, in s 32, only prohibited the act, as s. 2 did that dealt with in that section, and had not given the Court, by s. 32, the summary power of punishment, then the person violating the provisions of s. 32 could have been indicted, and might have been convicted; the mode of procedure prescribed for punishing an offence cannot change the nature of the offence. If, therefore, what the plaintiff did was a crime, it follows that he has been convicted of it. A conviction is the adjudication by a duly authorized tribunal on a violation of law: Tomlin's Law Dictionary, vol. i., tit. Convict; Wharton's Law Lexicon, tit. Conviction. The Act 40 & 41 Vict. c. 21, s. 41, and the prison rules made under it, can only apply to a person committed under that section, and the section only applies to persons committed for contempt of Court, not to persons committed for the violation of a penal statute. The Court which made this order was punishing, by a summary process, a breach of a statute, it was not exercising its disciplinary authority over one of its officers. Had that been the case the plaintiff could have appealed: *In re Hardwick* (1); but he could not appeal from this order, for it was an order sentencing him to punishment for a crime.

Wildey Wright, in reply.

July 28. DENMAN, J. The question for decision in this case is, whether the defendant, the governor of Holloway Prison, was justified in treating the plaintiff as a "criminal prisoner," or (to use the definition of s. 4 of the Prisons Act, 1865, 28 & 29 Vict. c. 126), a prisoner "convicted of a crime." It was agreed that if

(1) 12 Q. B. D. 148.

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he was not, judgment should be given for the plaintiff for 50*l.* damages and costs; otherwise, judgment for the defendant, with costs.

The prisoner was committed to Holloway Prison under a warrant issued in pursuance of an order of the Queen's Bench Division of the High Court of Justice, dated the 28th of November, 1883, by which, after reciting a hearing upon certain affidavits and upon a notice of motion, that certain persons might be struck off the rolls, and that they and the plaintiff might be punished under the 6 & 7 Vict. c. 73, and 23 & 24 Vict. c. 127 (they, for having, then being certificated solicitors, allowed the plaintiff to practise in their names, and the plaintiff, for having so practised, being an unqualified person), it was ordered that they should be struck off the rolls, and that the plaintiff be committed to the custody of the governor of Her Majesty's Prison, Holloway, for six months, pursuant to the statutes in that case made and provided.

The plaintiff, having been arrested in pursuance of this order, was taken to Holloway Gaol, and, on his arrival, protested against being placed on the criminal side and subjected to certain treatment to which he would not have been subjected if treated as a prisoner merely. The governor, the defendant, after considering the point, came to the conclusion that he ought to be placed on that side, and treated as a convicted criminal prisoner according to the acts and rules bearing upon the question, and he was in fact treated as a convicted criminal prisoner not sentenced to hard labour for the period mentioned in the order of the Court.

By s. 2 of 6 & 7 Vict. c. 73, it was enacted that no person should act as an attorney or solicitor without being duly qualified. And by s. 32 of the same Act it was enacted that if any attorney or solicitor should knowingly act as agent for any unqualified person he might be struck off the rolls; and then followed the provision—and in that case, and upon complaint in a summary way and proof on oath—"it shall and may be lawful to and for the said Court to commit such unqualified person . . . . to the prison of the said Court without bail or mainprize for any term not exceeding one year."

The plaintiff was undoubtedly committed under the powers of

these two sections, and it is equally free from doubt, unless the case of *Reg.* v. *Buchanan* (1) was wrongly decided, which I cannot assume, that if the case had arisen immediately after the passing of that Act he would have been liable to be indicted for a misdemeanour notwithstanding the summary proceeding authorized by s. 32, and notwithstanding that by s. 35 and 36 of that Act there were special provisions that a person so acting should be incapable of recovering his fees, and that his offence should be deemed a contempt of Court, and be punished accordingly. The last named sections were repealed by the Statute Law Revision Act of 1874, but apparently only for the reason that in the meantime had been passed the Solicitors Act, 1860 (23 & 24 Vict. c. 127), which by s. 26 provides to the same effect.

The question is whether under these enactments and the enactments and rules relating to prisons, the plaintiff became a "convicted criminal prisoner" by reason of the committal above described.

I am of opinion, notwithstanding the powerful argument of the Attorney-General to the contrary, that he did not.

I do not say that if instead of proceeding summarily under the Act the parties complaining of the plaintiff's conduct had indicted him for a misdemeanour, as in *Reg.* v. *Buchanan* (1), and he had been convicted of a misdemeanour, he would not have been liable to be dealt with as he has, but where no indictment is preferred, nor any proceeding which, by statute, is made to authorize a "conviction" in the ordinary sense of the word as applied to felonies or misdemeanours, whether punishable by indictment or by magistrates under some statute, I do not think that any person imprisoned by any Court can be held to be a convicted "criminal prisoner" within the meaning of s. 4 of the Prisons Act, 1865 (28 & 29 Vict. c. 126).

Several definitions of the word "crime" were referred to by the Attorney-General in the course of the argument, one by Mr. Justice Stephen in his History of the Criminal Law, which read by itself would go further than I should be prepared to indorse; but I do not understand that learned judge to be there intending to say anything contrary to what he says at the begin-

(1) 8 Q. B. 883.

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ning of chap. ii., art. 15, of his Digest of the Criminal Law under the heading of "Classification of Crimes": "Every crime is either treason, felony, or misdemeanour," and it is in this sense that I think the word is used in s. 4 of the 28 & 29 Vict. c. 126, and I cannot hold that there has been a conviction of the plaintiff of any such offence, though it is possible that the facts of the case might have warranted such a conviction.

Then, inasmuch as the plaintiff was not, in my opinion, a criminal prisoner within the meaning of the Act, it follows from the admission made at the trial that the plaintiff is entitled to judgment.

There is another ground on which I think he is so entitled. Sect. 67 of the Act of 1865 contains a provision for the classification of misdemeanants not sentenced to hard labour into two classes, according to the order of the judge who tries them, and empowers the judge to order such persons to be treated as misdemeanants of the first division, and a misdemeanant of the first division shall not be deemed to be a criminal prisoner within the meaning of this Act.

The subsequent Act (40 & 41 Vict. c. 21, s. 41) provides that any person who shall be imprisoned under any rule, order, or attachment for contempt of any Court shall be in like manner treated as a misdemeanant of the first division within the meaning of the said s. 67 of the Act of 1865.

It may be doubtful whether the plaintiff was, strictly speaking, imprisoned for contempt of Court because the order under which he was imprisoned does not so describe the cause of his committal.

But if not, it appears to me that at any rate he was imprisoned under a rule or order of the High Court of Justice, and that this is sufficient to bring him within s. 41 of the later Act. I do not read those words so as to restrict the rules or orders referred to necessarily to cases of contempt of Court, still less to "attachments" for contempt of Court. But, if it were necessary, I see no difficulty in holding that this was an imprisonment under a rule or order for contempt of Court, inasmuch as the 26th section of 23 & 24 Vict. c. 127, enacts that any person who acts as the plaintiff acted "shall be deemed guilty of a contempt of Court, and may be punished accordingly," i.e., as for a contempt of Court.

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But whatever be the exact construction of s. 41 of the later Prisons Act, I do not think that the committal of the prisoner under the order of the Queen's Bench Division made him a criminal prisoner within the definition of the Prisons Act, 1865 (28 & 29 Vict. c. 126), and I therefore give judgment for the plaintiff for 50*l.* and costs.

Judgment for the plaintiff.

Solicitor for the plaintiff: *Godfrey.*

Solicitor for the defendant: *Hare, Solicitor to the Treasury.*

R. B. R.

[IN THE COURT OF APPEAL.]

June 25, 26.

EX PARTE GILCHRIST. IN RE ARMSTRONG.

Bankruptcy—Married Woman trading separately from her Husband—Separate Property—General Power of Appointment—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 152—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 4, 15.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 5, "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole":—

Held, that the expression "separate property" includes only that which would, if the woman was unmarried, be her "property," and does not therefore include a general power of appointment by deed or will of which she is the donee, but which she has not exercised, and a married woman who has traded separately from her husband and who has been adjudicated a bankrupt, cannot be compelled to execute a deed exercising such a power in favour of the trustee in the bankruptcy.

Decision of Divisional Court (17 Q. B. D. 167) reversed.

APPEAL from an order made by a Divisional Court (Manisty and Cave, JJ.), reversing an order of the judge of the Brentford County Court, and directing that the bankrupt, a married woman, should execute a deed, in exercise of a general power of appointment vested in her, appointing the property subject to the power to the trustee in the bankruptcy.

The decision of the Divisional Court is reported ante, p. 167, where the facts are fully stated.

By the leave of the Court of Appeal the bankrupt appealed.

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Rilton, for the appellant. The power of appointment being unexercised is not "separate property" within the meaning of sub-s. 5 of s. 1 of the Married Women's Property Act, 1882 (1), and, if it would otherwise be within it, s. 19 excludes from the operation of the Act a settlement executed before the Act came into operation.

Sect. 4 shews that a general power of appointment is not treated by the Act as the same thing as "property." Sect. 44 of the Bankruptcy Act, 1883, does, no doubt, enact, as did s. 15 of the Bankruptcy Act, 1869, that "the property of the bankrupt" shall comprise "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge," but s. 1, sub-s. 5, of the Married Women's Property Act does not make this applicable to the case of a married woman, and s. 152 of the Bankruptcy Act, 1883, expressly provides that "nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882."

A power is clearly not "property," and, though if this power

(1) 45 & 46 Vict. c. 75, s. 1, sub-s. 5: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole."

Sect. 4: "The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Sect. 19: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property so to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

By s. 24 "The word 'property' in this Act includes a thing in action."

had been exercised in favour of volunteers, the property might be made available for the bankrupt's creditors, the bankrupt cannot be compelled to exercise it and to defeat the vested interest of her son: Sugden on Powers (8th ed.), pp. 186, 187; *Taylor* v. *Meads* (1); *Johnson* v. *Gallagher* (2); *Hughes* v. *Wells.* (3)

There is no imperative trust for sale in the settlement; the trustees are only empowered to sell the property with the consent of the bankrupt; they cannot be compelled to do so.

Cozens-Hardy, Q.C., and *Herbert Reed*, for the trustee in the bankruptcy. The power of appointment is "separate property" of the bankrupt within the meaning of sub-s. 5 of s. 1 of the Married Women's Property Act, 1882. The power being to appoint by deed or will, and the life interest of the bankrupt not being subject to any restraint on anticipation, she could give to a purchaser a good title to the whole estate, and the whole estate is, therefore, her "separate property" within the meaning of the Act. "Separate property" is the creature of Courts of Equity, and the Act must be taken to have used the words in the sense attributed to them by Courts of Equity. The "separate property" of a married woman is that property which she can dispose of at her own free will and pleasure without the consent of her husband: *Hulme* v. *Tenant.* (4) At page 568 the learned editor says: "The true view seems to be this, that, for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for her life for her separate use, with power to dispose of it by *deed or will*, that is her separate property, so as to be subject to her general engagements." That is in fact what was said by Jessel, M.R., in *Mayd* v. *Field.* (5) In *Heatley* v. *Thomas* (6) Sir William Grant, M.R. (at p. 603), pointed out the distinction between a life estate followed by a power to appoint by will only, and such an estate followed by a power to appoint by deed or will. This is in accordance with the judgment of Turner, L.J., in *Johnson* v. *Gallagher.* (7) And in *London Chartered Bank of Australia* v. *Lempriere* (8) it was held that, when a married woman had a life interest to her

(1) 34 L. J. (Ch.) 203.
(2) 3 D. F. & J. 494, 516.
(3) 9 Hare, 749.
(4) 1 W. & T. L. C. 5th ed. 536.
(5) 3 Ch. D. at p. 593.
(6) 15 Ves. 603.
(7) 3 D. F. & J. at p. 516.
(8) Law Rep. 4 P. C. 572.

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separate use, with remainder as she should by deed or will appoint, with remainder in default of appointment to her executors or administrators, and she by her will had exercised the power, her engagements must be satisfied out of the settled property. James, L.J. (p. 590), adopted the view of the law expressed by Turner, L.J.

[FRY, L.J. In the present case the remainder in default of appointment is, not to the wife's executors, but to her children.]

In *Barford* v. *Street* (1) real and personal estate was given by will to a trustee, on trust for a woman for her life to her separate use, with remainder as she should by deed or will appoint, with remainder in default of appointment on trust for sale, and to divide the money produced by the sale among all the children of her father. She had executed a deed-poll directing that the trustee should immediately convey and assign the property to herself; and the bill was filed against the trustee praying for a conveyance and assignment from him. Sir Wm. Grant, M.R., said (p. 139): "By her interest she can convey her life estate. By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition. The consequence is that the trustee must convey the legal fee according to the prayer of the bill."

"Separate property," in sub-s. 5 of s. 1 of the Act must mean property which a Court of Equity would have made available to satisfy the engagements of the married woman. Sub-s. 2 provides that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole." Sect. 4 provides that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." In *Godfrey* v. *Harben* (2) property was settled on a married woman for her separate use for her life, with remainder for such persons as she should by will appoint, with remainder, in default of appointment,

(1) 16 Ves. 135. (2) 13 Ch. D. 216.

for her next of kin. She made a testamentary appointment in favour of her daughter, and Hall, V.C., held that the appointed property was liable to the payment of the appointor's debts as if it were her separate estate. In *Pike* v. *Fitzgibbon* (1) Cotton, L.J. (at p. 466), intimated some doubt of the correctness of that decision. Sect. 4 was intended to affirm the view of Hall, V.C. Before the Act a contract by a married woman, to sell property which was subject to a general power of appointment by her by deed or will, would have been enforced.

The meaning of the word "property" in the Bankruptcy Act, 1869, is illustrated by *Ex parte Huggins*. (2)

As to s. 19 of the Married Women's Property Act, 1882, it has not the effect attributed to it.

LORD ESHER, M.R. The decision of the Divisional Court seems to have turned mainly upon the construction of s. 19 of the Act, and their attention does not appear to have been very fully directed to the point which has been argued before us. Therefore, in differing from their conclusion, we can hardly be said to be overruling their decision. The bankrupt is a lady who married her present husband before the passing of the Married Women's Property Act, 1882, and in contemplation of the marriage a settlement was made of her property, including the two houses now in question. [His Lordship stated the provisions of the settlement, and continued:—] She traded separately from her husband, and has become a bankrupt, and the question is whether she, not having exercised the power of appointment contained in the settlement, the Court of Bankruptcy can now order her to execute a deed appointing the two houses to the trustee in the bankruptcy for the benefit of the creditors? I think the solution of this question depends entirely upon what is the true construction of sub-s. 5 of s. 1 of the Married Women's Property Act, 1882. At common law, except by virtue of some local customs (in the city of London, for instance), a married woman could not be made a bankrupt, even though she were a trader. The Married Women's Property Act, 1882, therefore, contains a new enactment; not declaring the common law, but creating a

(1) 17 Ch. D. 454. (2) 21 Ch. D. 85.

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new liability on the part of a married woman who is a trader, and giving new rights to her creditors. The legislature might, if they had so thought fit, have placed her on the same footing as to her liability as an unmarried woman, or they might have created a limited liability on her part. What they have done is this: sub-s. 5 of s. 1 of the Act says that "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws as if she were a feme sole." It does not say that she shall be subject to the bankruptcy laws as if she were a feme sole, but only that "in respect of her separate property" she shall be subject to those laws as if she were a feme sole." Do those words, "in respect of her separate property," include a general power of appointment which she has not exercised?

Taking the words in their ordinary sense, without any knowledge derived from anything outside the Act, can they include something which, if she were not a married woman, would not be her property at all? Can they be carried further than to include that which, if she were a feme sole, would be her property, and which, although she is a married woman, is her separate property? If the appellant were a feme sole, or if she were a man having exactly the same power, it is perfectly clear that this unexercised power would not be "property" at all. The distinction between a power of appointment over property and property has always been recognised, and it has always been held that an unexercised power is not the "property" of the donee of the power. An exercise of this power would really be a dealing with the remainder which is now vested in the bankrupt's son by her first marriage. If she makes no appointment, and there are no children of the second marriage, the property will be his. No question as to the bankrupt's life interest is now before us. The legal estate in remainder (subject to the mortgage) is in the trustee of the settlement, and the beneficial interest is vested in the son. The bankrupt has a power of appointment, the exercise of which might take away that interest from him, but it is admitted that, if she were a feme sole, the unexercised power would not be her property, except by virtue of s. 44 of the Bankruptcy Act, 1883. The phrase "in respect of her separate property" would

not comprise an unexecuted power of appointment, unless some special meaning is given to the word "property" by the Bankruptcy Act, and s. 152 of that Act expressly provides that nothing in that Act contained shall affect the provisions of the Married Women's Property Act, 1882. The words "separate property" are used over and over again in the Act of 1882, and in every other part of the Act it is clear that they cannot comprise that which, if the married woman was a feme sole, would not be her property, and cannot, therefore, comprise an unexercised power of appointment, and I can see nothing to justify us in holding that the words are used in sub-s. 5 of s. 1 in any sense different from that in which they are used in the other parts of the Act. In the case of a feme sole or a man an unexercised power may possibly be brought within the meaning of "property" by s. 44 of the Bankruptcy Act, but, unless you can give to the words "separate property" in sub-s. 5 of s. 1 of the Married Women's Property Act a different meaning from that which they have in the other sections of that Act, the result is that there is something which will pass to the trustee in the bankruptcy of a feme sole or of a man which does not pass to the trustee in the bankruptcy of a married woman. This, in my opinion, is the conclusion to which we ought to come upon the construction of the Act, and if so, it would be futile to enter upon a consideration of the jurisdiction which a Court of Equity exercises in some cases, upon equitable grounds, to render property over which a married woman has a power of appointment available to satisfy her contracts. That power of a Court of Equity is by that construction of the Act excluded from the "separate property" of a married woman with which it is dealing. This is the conclusion at which I have arrived, and I need not deal with some of the ingenious arguments which have been presented to us. It is impossible for us to say that "separate property" includes that which is not "property" at all, and therefore we must disagree with the decision of the Divisional Court. This renders it unnecessary to consider the abstruse and difficult question which was raised with reference to s. 19 of the Act.

I desire to add this. The Divisional Court refused an application for leave to appeal from their decision, but leave to appeal

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was given by this Court. The jurisdiction which the judges of the Divisional Court have to give or to refuse leave to appeal from their own decisions is a very delicate one. Merely to say that they are satisfied their decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case.

Bowen, L.J. I am of the same opinion. The question is, what is the meaning of the words "separate property" in sub-s. 5 of s. 1 of the Married Women's Property Act, 1882? I think the first step towards a decision of this question is made when one comes to a clear conclusion that "separate property" must mean the same thing in this sub-section as throughout the Act. Is this unexercised power of appointment "separate property" within the meaning of those words as used in the Act generally? One would have thought that this question must solve itself as soon as it is stated. It is not "property" at all. This is too plain for argument; it is a power, and nothing more. If the lady had been unmarried it would clearly not be her "property." How, then, can it be her separate property because she is married? The only conceivable way in which that, which would not be the property of a woman if she was unmarried, could become her separate property if she was married, would be if Courts of Equity had held that it was separate property, and accordingly it has been argued that Courts of Equity have held that to be the separate property of a married woman, which would not be her property at all if she was not a married woman. This proposition appears to me to be absolutely unfounded. It is perfectly true that Courts of Equity have in some cases given effect to the contracts of a married woman out of property over which she had a general power of appointment, the remainder in default of appointment being limited to her executors or administrators, just as if it had been her own property, but in no case that I am aware of has this been done during the lifetime of the married woman. But it is argued that, even if this has never been done by a Court of Equity, still this unexercised power of

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appointment is "property" in the view of the Court of Bankruptcy. And, no doubt s. 44 of the Bankruptcy Act, 1883, following the provisions of former Bankruptcy Acts, has brought within the grasp of the Court of Bankruptcy, and within the definition of "property" contained in that Act, powers of appointment which a bankrupt can exercise for his own benefit, and which would not otherwise have been his "property." But in order to make that argument good it must be pushed to this length, that the words "separate property" in the Married Women's Property Act include "property" in the wide sense given to that word by the Bankruptcy Act. Can it be said that the Married Women's Property Act for all purposes makes that "separate property" which is not "property" in the widest ordinary sense of the word, but only in the sense given to the word by the Bankruptcy Act? The Married Women's Property Act is not the Bankruptcy Act, and that Act is not incorporated with it. If the legislature had intended to say that, for the purposes of the bankruptcy of a married woman, everything was to be dragged within the net which would have been "property" in her bankruptcy if she had not been a married woman, sub-s. 5 of s. 1 would have been the proper place to say so. But, either intentionally or per incuriam, the legislature have omitted from sub-s. 5 the words which are necessary to bring such an unexercised power within the net of the Bankruptcy Court, and have only brought within it that which would have been "separate property" aliunde. It seems to me that the other sections of the Married Women's Property Act prove conclusively that it was not intended to treat as the "separate property" of a married woman anything which would not have been her "property" if she had not been married. Sect. 2, for instance, provides that every woman who marries after the commencement of the Act "shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage." If the woman was not married, execution could not have been issued against this power. The result of holding that an unexercised power of appointment is "separate property," would be to place a married woman in a worse position than a

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feme sole. The truth is, that such a power as this has been, either designedly or by accident, omitted from sub-s. 5. The appeal must, therefore, succeed.

Fry, L.J. The question turns on the meaning of the words "separate property" in sub-s. 5 of s. 1 of the Married Women's Property Act, 1882.

The first question is, what is the true legal meaning of the words "separate property?" The second question is, is there anything to shew that those words are used in a secondary or special sense in the Act?

With regard to the meaning of those words generally, it is desirable to bear in mind the nature of the settlement with which we are dealing. It is a settlement of certain real property which is conveyed to a trustee, who is to hold it upon trust, in the first place, to keep down the interest on certain charges, and then to pay the residue of the income to the married woman during her life for her separate use, but expressly without any restriction on anticipation. Then a power is given to her to appoint the property by deed or will to such persons, for such estates, as she shall think fit. Subject to that, the trustee is to hold the property for the benefit of the only child of the married woman by her previous marriage, and the children of the intended marriage. Then there are two powers given by way of proviso: one is a power to the trustee to sell or exchange the property with the consent of the married woman; and the other is a power for the trustee, with her consent, to raise by sale or mortgage of the property such sum as she may direct, and to pay the money into her hands. We have not now to deal with either of the two latter powers; they are not in controversy. We have only to deal with a question which arises on the power of appointment which immediately follows the life interest. The question is, whether the bankrupt can be required to execute a particular deed, which purports to exercise only that power of appointment which precedes the interest given to her children. With the other powers we have nothing to do now. The question is, whether the general power of appointment given to the bankrupt is her "separate property" within the meaning of sub-s. 5 of s. 1 of the Act of 1882. To my

mind the question is one of the most elementary description, and, if it had not been argued as it has, I should have thought it unarguable. No two ideas can well be more distinct the one from the other than those of "property" and "power." This is a "power," and nothing but a "power." A "power" is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his "property" than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they "property." In one sense no doubt they may be called the "property" of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not "property" within the meaning of that word as used in law. Not only in law but in equity the distinction between "power" and "property" is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition. We all know that, when the Statute of Uses enabled persons to declare uses, conveyancers availed themselves of it, and were in the habit of reserving powers to alter the uses declared by conveyances or settlements of land. But powers remained just as they were before the Act—they were not property, they were merely an individual capacity to do something.

Again, when the equitable doctrine of trusts was reconstituted after the passing of the Statute of Uses, the Courts of Equity recognised the capacity of certain persons to declare trusts by deed or will, and thus to mould or modify the existing trusts of property. This capacity, however, was only a power to do something; it might result in property, but it was not property at all. These are powers of the same kind as that with which we are now dealing—powers to modify either existing legal uses or existing equitable trusts. I repeat that such powers are no more property than a power to do any act which an individual may do.

That being so, have the Courts ever said that such powers are "property?" If they have, it would be our duty to follow their decision. But no such imputation can with propriety be

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cast on the Courts of Law or Equity; they have always recognised the distinction between "power" and "property." I will illustrate this by referring to what was said by Kindersley, V.C., in *Vaughan* v. *Vanderstegen* (1), which for the present purpose expresses the law quite correctly. Having referred to several cases, the Vice-Chancellor said (p. 189): "These cases clearly recognise that a power of appointment given to a married woman, and a trust for her separate use, are perfectly distinct, even when they affect the same estate or interest; à fortiori, they are perfectly distinct when the trust for separate use affects only the life estate, and the power affects only the reversion." It must be observed that, whatever confusion (if any) has arisen in the Courts of Equity, is due to the fact that questions of this kind have very often arisen in reference to the claims of persons who have asserted their right as creditors to reach the separate estate of a married woman, and also property subject to her power of appointment, because in equity there were two doctrines by virtue of which relief was given to the creditors of a married woman. The first of those doctrines related to the separate estate of a married woman, and I think it arose in this way. When the Courts of Equity gave to a married woman the benefit of their peculiar doctrines, and treated her as a feme sole in respect of her separate estate, they went further, and subjected her to the same liability in respect of that separate estate as if she had been a feme sole. Upon that principle (which was the subject of a great deal of discussion) the Courts got at the separate estate of a married woman for the purpose of satisfying her debts. But there was a second doctrine, which was often invoked together with the other, viz., that, when a married woman had a power of appointment which she could exercise for her own benefit, the Courts were inclined to consider that certain contracts entered into by her might be deemed to be an imperfect exercise of that power, or they considered that, if she had in fact exercised the power in favour of volunteers, she might be deemed to have done so in order to convert those volunteers into trustees for the benefit of creditors with whom she had contracted debts. In one or other of those ways Courts of Equity in certain cases got at property which a married woman

(1) 2 Drew. 165.

had power to appoint for her own benefit, i.e., by means either of the doctrine of an imperfect exercise of a power, or the doctrine that volunteers, to whom an appointment had been made, took the property appointed to them subject to an equity in favour of the creditors of the appointor. Those doctrines must not be confused with the other doctrine which relates to the separate estate of a married woman. That the doctrines are entirely distinct is shewn by this. In certain cases where a married woman had a power of appointment over real estate, her contract to sell that real estate was enforced against the estate, by means of the doctrine of imperfect exercise of a power, although she might have no separate use whatever in the property. Whether it could be enforced or not depended on the formalities required, and upon the nature of the instrument by which she might exercise the power. The two doctrines, however, the one relating to separate estate and the other relating to powers of appointment which a married woman might have—were always dealt with separately in equity. I will illustrate this by a passage from the judgment of Turner, L.J., in *Johnson* v. *Gallagher*. (1) He said (p. 516): "The separate estates of married women being thus far bound by their debts, obligations and engagements, it has next become a question how far those debts, obligations and engagements affect the corpus of the property, where the married woman has a limited interest only, as for instance a life estate with a power of appointment. The cases on this subject may, as it seems to me, well be classed under three heads: first, where the power of appointment has been general, by deed or writing, or by will; secondly, where it has been by will only and the power has been exercised; and thirdly, where there has been a limitation in default of appointment and the power has not been exercised. In cases falling under the third class there cannot, as it seems to me, be any reasonable doubt that the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment, and the case of *Nail* v. *Punter* (2), impliedly decides that point. In cases falling under the second class, where the power of appointment is by will only and has been exercised, but not for creditors, the authorities do not appear to me to be

(1) 3 D. F. & J. 494. (2) 5 Sim. 555.

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consistent. In *Norton* v. *Turvill* (1), as explained in *Sockett* v. *Wray* (2), the exercise of the power by the will of the married woman seems to have been held to let in a bond creditor against the appointees under the will; and in *Hughes* v. *Wells* (3) I seem to have intimated that this might be the effect of the exercise of the power, as in other cases of the exercise of the general power of appointment by will, and certainly not upon the ground that power is property. But the Vice-Chancellor Kindersley, in whose judgment I have quite as much confidence as in my own, seems to have dissented from *Hughes* v. *Wells* (3) in the case of *Vaughan* v. *Vanderstegen* (4), and I observe that Sir William Grant has treated the point as doubtful in *Heatley* v. *Thomas*. (5) I say no more, therefore, upon this point than that it may be considered as open. But, in cases falling under the first class, where the power of appointment has been by deed or writing, or will, the Courts have certainly held the corpus of the property to be subject to the debts and engagements of the married woman: *Allen* v. *Papworth* (6); *Hulme* v. *Tenant* (7); *Heatley* v. *Thomas* (5); although it is to be observed that during the life of the married woman the Court has never gone further than to affect the limited interest: *Hulme* v. *Tenant* (7); *Field* v. *Sowle*. (8) There has been much question in the cases on what grounds the Court has thus subjected the corpus of the property to the debts. In most, if not all, of these cases the liability of the corpus has been put upon the ground that the instruments by which the debt was created or secured operated as executions of the power of appointment, but it seems clear that such instruments cannot operate as appointments in the strict sense of the term." The Lord Justice points out that the two doctrines relating to separate estate and property subject to a power of appointment are distinct. I think, therefore, that we should be departing from the true legal meaning of the word "property," if we assented to the proposition that the word in its most general sense includes the capacity to do an act.

(1) 2 P. Wms. 144.
(2) 4 Bro. C. C. 483.
(3) 9 Hare, 749.
(4) 2 Drew. 165.
(5) 15 Ves. 596.
(6) 1 Ves. Sen. 163.
(7) 1 Bro. C. C. 15.
(8) 4 Russ. 112.

It has been urged by Mr. Cozens-Hardy, that, although "property" may not include a general power of appointment, "separate property" may include it. That is a remarkable argument, because the effect of it is to make the *species* more extensive than the *genus*. It seems to me that "separate property" must be more limited, not more extensive, than "property."

Then it is said, that, whatever is the proper legal signification of the words "separate property" irrespective of their context, yet, as used in this Act, they must be deemed to include a power. It is difficult to see why they should. It is quite true that a power is not referred to in this Act, except in s. 4. But the very fact that the capacity of a married woman to exercise a general power was present to the mind of the legislature seems to lean against the conclusion at which the respondent asks us to arrive. The words "separate property" are used in other sections of the Act, and, if we should hold that "separate property" in sub-s. 5 of s. 1 includes a power, it appears to me we must hold that it does so throughout the whole of the Act. I am not prepared to come to the conclusion that the legislature did intend to include general "powers" of appointment under the words "separate property"; they may well have been minded to exclude such powers. The legislature may have contemplated a case such as the present, in which the result of giving effect to the power in favour of the trustee in the bankruptcy would be to defeat the interests of the children of the married woman. Or, again, the legislature may have borne in mind this, that Courts of Equity have not given effect to these powers of a married woman in favour of her creditors until after her death, and they may have intended not to interfere with that restriction upon the exercise of the equitable doctrine. Whether that be so or not, in the present case we have nothing to do but to construe the words "separate property" according to their ordinary meaning, there being, as it seems to me, nothing in the context of the Act to shew that any secondary meaning was intended.

One other observation must be made. It has been suggested, though not very strongly urged, that the word "property" in sub-s. 5 ought to receive the same signification as is given to it

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by s. 15 of the Bankruptcy Act, 1869, which was the Bankruptcy Act in force at the time when the Married Women's Property Act, 1882, was passed. But, if we are to look at that section of the Act of 1869, we must look at the whole of that Act, and then we find that s. 4 contains a definition of "property" which does not include powers. It follows, therefore, in my judgment, that it is impossible to treat s. 15 of the Bankruptcy Act, 1869, as in any way qualifying sub-s. 5 of s. 1 of the Act of 1882. And, if we refer to the subsequent legislation, this conclusion seems to be corroborated. When the Bankruptcy Act of 1883 was passed, the legislature re-enacted, by s. 44, the provisions of s. 15 of the Act of 1869, but at the same time provided, by s. 152, that nothing in that Act should affect the provisions of the Married Women's Property Act, 1882. In truth a power is not "property," and the power of a married woman is not her "separate property." This power of appointment does not come within the words of the Act, and the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Woodbridge & Sons.*
Solicitors for trustee: *J. A. & H. E. Farnfield.*

W. L. C.

April 12.

[IN THE COURT OF APPEAL.]

PEARCE *v.* FOSTER and Others.

Master and Servant—Dismissal of Servant—Misconduct of Servant—Gambling in "Differences" upon the Stock Exchange.

The plaintiff had been employed as clerk by the defendants, who were merchants, for many years, and ultimately they agreed to retain him in their employment for a term of ten years. Before the expiration of that period the defendants discovered that the plaintiff had for many years previously been engaged in speculating in "differences" upon the Stock Exchange to the extent of many hundreds of thousands of pounds, and they thereupon dismissed him from their service:—

Held, that the dismissal of the plaintiff was justifiable.

Action for wrongful dismissal.

The action came on for trial before Grove, J., sitting without a

jury, during Michaelmas Sittings, 1885, when the following facts were proved:—

The plaintiff entered into the service of the defendants' firm in August, 1858, at a salary of 80*l.* a year, and was employed in conducting the foreign correspondence. He had nothing to do with the cash, or the cheques, or the financial part of the firm's business; but he was constantly consulted as to the business done by the firm for their customers, including the buying and selling of securities. The defendants were general merchants, and received produce from abroad for sale on commission: they received orders to purchase various manufactures and other things in England for shipment to places abroad: and they had on two occasions issued foreign loans: they also held on account of foreign correspondents abroad very large amounts of foreign stocks represented by bonds payable to bearer. Some of these stocks had been purchased by the defendants and kept on account of foreigners residing abroad: others had been sent over to them for safe custody, probably to make advances upon, and they sometimes had to sell these bonds when their principals instructed them to do so. It was also their duty to sell foreign bonds when so directed by the owners of them. The salary of the plaintiff was gradually raised, and gifts were made to him by the defendants. Upon the 9th of February, 1882, an agreement in writing was entered into between the plaintiff and the defendants, whereby the plaintiff was to serve the defendants as their principal clerk for ten years from the 1st of January, 1882, at a salary of 2000*l.*, to be paid from that date: 300*l.* was to be paid to him on March 31st, June 30th, September 30th, and December 31st, and 800*l.* per annum was to be invested in some security or securities to be approved by the plaintiff in the joint names of himself and of the partners of the firm; the plaintiff was to receive the income on the investments, but the principal was to remain invested until the termination of the agreement. No provision was contained in the agreement as to dismissing the plaintiff. Upon the 31st of July, 1884, the defendants became aware that for many years previously the plaintiff had been engaged in speculative transactions in "differences," or time-bargains, upon the Stock Exchange to an enormous amount, in fact, to the extent of

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many hundreds of thousands of pounds. These transactions had been entered into by the plaintiff without the knowledge of the defendants. When the defendants became aware of the plaintiff's speculations, they dismissed him from their service.

Grove, J., was of opinion that the dismissal of the plaintiff was lawful, and gave judgment for the defendants.

The plaintiff appealed.

Murphy, Q.C., and *Finlay, Q.C.* (*English Harrison*, with them), for the plaintiff. In order to justify a master in dismissing a servant for his misconduct, the misconduct must be committed in the course of the service or must relate to the duties which the servant is bound to perform. In the present case the duty of the plaintiff was to conduct the foreign correspondence; he was not engaged in the financial business of the defendants. It was immaterial to the discharge of the plaintiff's duties that he was speculating in differences upon the Stock Exchange, and there being no fraud upon his part, he was not bound to disclose his speculative transactions to the defendants: *Fletcher* v. *Krell*. (1) Moreover, all evidence as to the plaintiff's transactions prior to February, 1882, ought to have been rejected. In *Read* v. *Dunsmore* (2) the misconduct, alleged to be sufficient to justify the dismissal, was committed at the place of the servant's employment. Where a servant has been hired for a specified time, he can be dismissed before the expiration of that time only if he has been guilty of moral misconduct, either pecuniary or otherwise, wilful disobedience, or habitual neglect: *Callo* v. *Brouncker*. (3) In *Lacy* v. *Osbaldiston* (4) the servant had been guilty of insubordination. In *Fillieul* v. *Armstrong* (5) the judges of the Court of Queen's Bench appear to have thought that in order to justify the dismissal of a servant, he must be guilty of either moral misconduct or behaviour involving his master in loss. A master, if he relies upon the general disobedience of his servant as a ground of dismissal, must prove either wilful disobedience or disobedience followed by loss: *Cussons* v. *Skinner* (6); but in the present case

(1) 42 L. J. (Q.B.) 55.
(2) 9 C. & P. 588.
(3) 4 C. & P. 518.
(4) 8 C. & P. 80.
(5) 7 A. & E. 557.
(6) 11 M. & W. 161.

the plaintiff did not wilfully disobey the defendants, nor did his conduct in speculating upon the Stock Exchange occasion any loss to them: the speculations were not incompatible with his duties in their service. The question in cases of this kind is, whether a servant has so conducted himself that it would be manifestly injurious to the interests of the master to retain him: Macdonell on Master and Servant, part I., ch. 22, p. 212: in the present case the conduct of the plaintiff was not injurious to the interests of the defendants.

Sir C. Russell, A.G., and *Shiress Will, Q.C.* (*Moulton, Q.C.*, with them), for the defendants, were not called upon to argue.

LORD ESHER, M.R. We are all of opinion that this case is quite clear.

The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. It is not that the servant warrants that he will duly and faithfully perform his duty; because, if that were so, upon breach of his duty his master might bring an action against him on the warranty. But the question is, whether the breach of duty is a good ground for dismissal. I have never hitherto heard any doubt that that is the true proposition of law. What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also will fall within the proposition. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that

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all reasonable men would say that he cannot be trusted, the master may dismiss him.

The question is, whether we can differ from the learned judge who has determined the question of fact with reference to a confidential clerk to merchants, who, in the course of his duty, might have to advise his masters upon monetary matters, and who, in the course of his duty, might be called upon by his masters to have in his hands securities of great value, but who is found during the service, secretly from his masters, to have been engaged not in one or two small transactions, but in enormously large gambling transactions on the Stock Exchange in differences, so that he might at any time be landed in immense losses; and whether we can say that the learned judge is wrong in holding that a man who has done that whilst he was a servant, has done that which is incompatible with a safe performance of his duty to his masters; and if the learned judge has held that such a clerk, by such a course of conduct to such an extent has brought himself into a position, that the masters cannot fairly rely upon his faithfulness—because the clerk has palpably left himself open to temptation, so great that it is beyond safety to the masters and to the masters' business—the question is whether we can say that the learned judge is wrong, or that a jury would be wrong, in finding that that is incompatible with the safe performance of his duty to his master. Wherever a clerk in a mercantile service, or in a service of trust, breaks any of the rules of good conduct, and wherever a jury finds that the master was justified in dismissing him, I should like it to be known by all persons in that position that this Court will uphold the decision, and I think that every judge and every jury, if such conduct is brought before them as has been imputed to and proved against the plaintiff in this case, holding the position which he did in the office of merchants, would come to the conclusion that gambling to a large extent on the Stock Exchange in differences is wholly incompatible with the due and faithful performance of his duties, if he does so unknown to his master. I should like to say in plain terms, so that it may be understood, that the moment it is made known to a master that his clerk has been gambling to anything like this extent

on the Stock Exchange, that of itself will authorize any tribunal in saying that the master was justified in dismissing the servant. I think that the judgment of the learned judge was beyond all doubt and question perfectly right.

LINDLEY, L.J. I am entirely of the same opinion, and if it were not for the importance of the case both to the plaintiff and to persons generally in his position, I should content myself by simply acquiescing in the observations which have been made by the Master of the Rolls; but I will say one or two words as to the nature of the business which was carried on by the plaintiff's employers, and as to the nature of his duties.

Now the nature of the business carried on by the firm was explained at the trial, and it appears that the defendants not only carry on the ordinary business of merchants, but they are also engaged for their customers and friends in very large dealings in securities. The plaintiff had been in the employment of the defendants for years, and had risen from a small salary to a large one, and apparently he had so conducted himself as to rise gradually and steadily not only in his position but in the confidence of the firm to such an extent, that in February, 1882, they engaged him for ten years at a salary of 2000*l.* a year as their confidential clerk. The defendants had such confidence in him that in that agreement there is no provision for giving him notice of dismissal. Such a contingency seems not to have occurred to any of them. It was shewn that this gentleman was frequently and often consulted by the members of the firm as to securities in which money should be invested, and it was his duty to give his employers, when consulting him upon such matters, his disinterested advice. Now it appears to me that he had so conducted himself as to make his interest conflict with his duty, that is to say, that he had a personal interest in securities of various kinds arising out of these gambling transactions. They were pure gambling transactions; and he had such a personal interest as to render his advice, when consulted by his employers upon matters within the scope of his employment, not disinterested, but, on the contrary, interested. He had deliberately placed himself in that position, which rendered his

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interest conflicting with his duty. I do not say that he yielded to temptation, to which, in that difficult position, he was naturally exposed; but I do say this, that he ought not to have put himself in that position. Further than that, it appears to me to be perfectly obvious, that if this kind of conduct had been known to the persons who were accustomed to deal with this firm, that very knowledge would damage the firm. I cannot conceive myself that anybody would have the same faith in a firm such as this, who had as their confidential clerk a person largely gambling on the Stock Exchange, as they would have in a firm who had a confidential clerk who abstained from such gambling transactions. It appears to me, therefore, that the plaintiff having habitually conducted himself in such a manner as would injure the business of his employers if his conduct were known, they might dismiss him upon discovery of such conduct. It is not necessary for them to prove that they have in fact suffered by reason of his conduct. Such proof is not adduced; for his conduct was not known either to his employers or to their customers. But the defendants would suffer or might suffer very seriously indeed, if they kept the plaintiff in their employ knowing that he was a gambler.

It seems to me that the decision of Grove, J., was correct, and I entirely agree with him.

LOPES, L.J. I propose only to say a few words as to the law which applies in this case.

If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant. Applying that law to this case, let us see how the matter stands. What is the position of the defendants who were the employers? They are entrusted with securities and valuables from their correspondents abroad.

Their position is highly fiduciary. What was the position of the plaintiff in their service? He was their confidential and principal clerk. They were in the habit of consulting him from time to time with regard to different securities that were placed in their hands, how those securities were to be dealt with, and how they were to be invested. They were beyond all question entitled to his unbiassed and disinterested advice. I think I may go even further than that, and say that they were entitled to the unfettered use of his mind. What does the plaintiff, who occupies that position, do? Admittedly he gambles on the Stock Exchange. They are not transactions at long intervals, but it is a systematic proceeding of gambling on the Stock Exchange, and to an enormous amount. Can it, in such circumstances, be said that that conduct on the part of the plaintiff is not incompatible with the faithful discharge of his duty to his employers? Can it with any reason be said that a man who is interested to the large extent that he was in certain securities, could be in a position to give the same unbiassed and unfettered advice to his principals that a man could, who was not so circumstanced? Again, can it with any reason be said that a man who is speculating and gambling to that enormous extent on the Stock Exchange, and who of necessity must be known to be dealing in that way, would not be likely to injure the reputation and position of his employers? I am clearly of opinion that the judgment of the Court below was right, and this appeal ought to be dismissed.

Judgment for the defendants.

Solicitors for plaintiff: *Roy & Cartwright.*
Solicitor for defendants: *Clements.*

J. E. H.

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July 9, 14.

RICHARDS *v.* JENKINS.

Practice—Interpleader—Goods taken in Execution—Title of Third Party—Right of Execution Creditor to set up against Claimant.

In an interpleader issue between the execution creditor and a claimant it is open to the execution creditor to defeat the claim by establishing a title to the goods in a third party which is superior even to his own.

The claimant, having let goods to W., became bankrupt. He did not inform his trustee that he owned these goods, and W., being unaware of the bankruptcy, continued to pay him money for the hire of them. The goods were taken in execution under a judgment recovered against W.

In an interpleader issue between the claimant and the execution creditor:—

Held, that the execution creditor was entitled to judgment, that being, primâ facie, in possession, he could shew that the claimant had no right to the goods, and that he was entitled for that purpose to set up against the claimant the title of the trustee in bankruptcy.

APPEAL from the decision of the judge of the County Court of Glamorganshire, on an interpleader issue.

The facts were as follows:—

The plaintiff had, prior to 1884, demised to Williams a brick yard with certain engines and plant thereon.

In 1884 the plaintiff became bankrupt, but he did not inform the trustee in his bankruptcy that he owned these goods, and Williams, being unaware of the plaintiff's bankruptcy, continued to pay him rent for the hire of them.

The defendant having recovered judgment against Williams, these goods were taken in execution, and the plaintiff having claimed them, an interpleader issue was directed between the claimant, as plaintiff, and the execution creditor, as defendant. The county court judge gave judgment for the plaintiff, on the ground that the defendant could not set up the title of the trustee in the bankruptcy so as to defeat the claim of the plaintiff.

The defendant appealed.

Glascodine, for the defendant. The judgment of the county court judge proceeds on a misapprehension of *Carne* v. *Brice*. (1) The claimants were the defendants in that case, and it was held

(1) 7 M. & W. 183.

that they could not set up a jus tertii; but in this case the defendant is not the claimant, nor does he desire to set up any jus tertii; all that he maintains is that the plaintiff is not the owner of the goods and that the plaintiff cannot on this issue shew that some one else is the owner: *Green* v. *Rogers*. (1) *Gadsden* v. *Barrow* (2) does not conflict with the defendant's contention. In *Edwards* v. *English* (3) the bill of sale was void, and in that case the execution creditor was really also the claimant, as was also the case in *Curties* v. *Jacobs*. (4) The plaintiff is not entitled to the possession of these goods, and even though the issue may be directed to enable any person lawfully entitled to possession to sustain his claim, that would not help the plaintiff: *Green* v. *Stevens*. (5) The defendant cannot be estopped, for he did not know of the bankruptcy: *Richards* v. *Johnson*. (6)

R. V. Williams, for the claimant. In a sheriff's interpleader the real question is whether the goods seized do or do not belong to the execution creditor. *Chase* v. *Goble* (7) may be an authority for the defendant, but that case has not been acted on for many years. It was decided in 1841, and at that time the claimant in all interpleader issues was treated as a plaintiff in trover, and if he failed to establish his title he failed on the issue. A different view was gradually adopted, and in 1860 the change was recognised, as may be seen from *Bird* v. *Crabb* (8), *Shingler* v. *Holt* (9), *Curties* v. *Jacobs* (4), and Lush's Practice, 3rd ed., vol. 2, p. 780. *Carne* v. *Brice* (10) is an authority for the plaintiff; it decides that the defendant cannot defeat the title of the plaintiff by setting up a jus tertii. The object of the issue is to inform the Court whether the goods were on a certain day liable to be seized in execution by the judgment creditor; the claimant must therefore give some evidence to displace the primâ facie title of the execution creditor, and on the evidence in this case the plaintiff establishes a good possessory title. "It seems to

(1) 2 C. & K. 148.
(2) 9 Ex. 514; 23 L. J. (Ex.) 134.
(3) 7 E. & B. 564; 26 L. J. (Q.B.) 193.
(4) 16 L. T. 574.
(5) 2 H. & N. 146.
(6) 28 L. J. (Ex.) 322.
(7) 2 Man. & Gr. 930.
(8) 30 L. J. (Ex.) 318.
(9) 30 L. J. (Ex.) 322.
(10) 7 M. & W. 183.

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me in substance" said Bramwell, B., in *Shingler* v. *Holt* (1), "the issue tried was, and it ought to be so stated, whether the goods were the plaintiff's, as against the execution creditor." These last words used formerly not to be in the issue, but they were inserted about 1860. *Edwards* v. *English* (2) shews that a jus tertii cannot be set up on the trial of such an issue as this. The fact that the title by which it is attempted to defeat the claim of the plaintiff is the title of a trustee in bankruptcy makes no difference, and certainly does not tell against the plaintiff.

Glascodine, in reply.

Cur. adv. vult.

July 14. The judgment of the Court (Wills and Grantham, JJ.), was delivered by

WILLS, J. This is an interpleader issue, in which the facts are as follows:—

The defendant recovered judgment against a person of the name of Williams, upon which judgment execution issued, and goods in the possession of Williams were seized. Thereupon the plaintiff claimed them, and became the claimant in the interpleader issue. It appeared that the claimant prior to 1884 had let the goods in question to Williams. In 1884 the claimant became bankrupt. His trustee did not know that he had the property in question, and he withheld the information from his trustee and continued to receive payment for the hire of the goods. On the trial of the interpleader issue he alleged that he did so because the goods were mortgaged to his bankers and he thought his interest in them was worthless. The excuse is immaterial, and probably untrue. The fact remains that Williams did not know of the bankruptcy, and continued after the bankruptcy to pay the hire to the claimant.

Upon these facts the county court judge gave judgment for the claimant, holding, on the supposed authority of *Carne* v. *Brice* (3), that the defendant, the execution creditor, could not set up the title of the trustee in bankruptcy of the claimant to defeat his claim.

(1) 30 L. J. (Ex.) 322, at p. 326. (2) 7 E. & B. 564; 26 L. J. (Q.B.) 193. (3) 7 M. & W. 183.

We are of opinion that the learned county court judge was wrong, and has misapprehended the decision in question, which appears to us to be in harmony with a number of other decisions on the same subject and to be an authority in favour of the defendant and not of the claimant.

In *Carne* v. *Brice* (1) the plaintiff in the issue was the execution creditor. The goods at the time of the seizure were in the possession of Morgan, the execution debtor. They were claimed by the trustees of Mrs. Morgan's settlement, who, however, failed to make out any title to them. It was held that they were not at liberty to set up, in order to defeat the execution creditor, the prior bankruptcy of Morgan. The substance of this decision is that the execution creditor having a title primâ facie lawful can only be defeated by a person shewing a better title of some sort, and that the trustees of the wife's settlement not being in possession and having no title themselves could not give themselves title by shewing that some one else had a title superior to that of both themselves and the execution creditor. Let the execution creditor and such person settle the question between themselves.

So here the execution creditor is primâ facie in lawful possession. The claimant has no shadow of a title. Even as between himself and Williams he had none. The right of the claimant to set up title against Williams ceased on his bankruptcy, and not so much as an estoppel could be set up even as between Williams and the claimant when Williams did not know of the bankruptcy and continued to pay his rent in ignorance of the fact that the claimant was receiving money which belonged to his trustee. The plaintiff had no more title to the goods than a thief into whose hands they had fallen, and had no more right to claim them or to receive payment for the use of them from Williams. It is clear also that where the title of the claimant is merely one by estoppel against the debtor the execution creditor is not bound by such an estoppel: *Richards* v. *Johnson*. (2) The form of the interpleader issue is immaterial, and it has always been so regarded, even in days when mere form met with much

(1) 7 M. & W. 183.

(2) 28 L. J. (Ex.) 322.

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more consideration than it does at present: *Carne* v. *Brice* (1), per Parke, B.; *Gadsden* v. *Barrow* (2), per Alderson, B.; *Edwards* v. *English* (3), per Lord Campbell, L.C.J.

The true test is that given by Parke, B., in *Gadsden* v. *Barrow*. (4) Suppose the person disputing the execution had sued the sheriff, could he have recovered? To succeed in such an action he must have, in the words of Parke, B., "either an absolute or a special property in the goods, and also the right of possession." No distinction can now be drawn between equitable and legal rights, and had the only obstacle to the plaintiff's title in this case been that he had mortgaged the property in question to the bank the execution creditor could not have denied his right to recover. But here he has neither property absolute or special nor the right of possession, and he is in no better position than any other person would have been who had by a misrepresentation or a concealment of the truth managed to get Williams to pay him for the hire as if he were the owner. Other cases have been cited which it has been suggested are inconsistent with this view. After a careful examination of the authorities, which are very nearly all collected in Mr. Cababe's useful work on Interpleader, we can find none which do not support it. In *Chase* v. *Goble* (5) the sheriff had seized goods and was in possession. The claimants claimed under assignments which it was contended were in themselves acts of bankruptcy: see per Tindal, C.J., at p. 936. It was held that if the deeds were acts of bankruptcy the claimants could not recover. They had in that case no other property absolute or special in the goods than that under the assignments, in other words, they had none at all, and could not recover, although they had after the bankruptcy entered into possession. It was a possession with no colour of title to support it, and they accordingly failed to make good their claim. In *Belcher* v. *Patten* (6) execution had issued against Brown. A prior writ of execution had been put in force under which the officers were in possession at the time of the seizure; but (according to

(1) 7 M. & W. 183, at p. 185.
(2) 9 Ex. 514, at p. 517; 23 L. J. (Ex.) 134.
(3) 26 L. J. (Q.B.) 193; 7 E. & B. 564, at p. 568.
(4) 9 Ex. 514, at p. 515.
(5) 2 M. & G. 930.
(6) 6 C. B. 608; 18 L. J. (C.P.) 69.

Coltman, J.), nothing had occurred to prevent the second levy from being good subject to the satisfaction of the first. The title of the assignees, the claimants, accrued subsequently. They failed to make out their title and then desired to set up that of the first execution creditor, and also that of the landlord who had seized for rent on the same day as that on which the second execution was put in. It was held that they could not do so. The decision seems to be entirely in harmony with *Carne* v. *Brice*. (1)

In *Gadsden* v. *Barrow* (2) the sheriff had seized goods in the possession of the debtor. The claimant claimed them under a bill of sale. The execution creditor was allowed to defeat his title by shewing a prior bill of sale. The claimant had never been in possession, and simply had no title, having had the goods of A. assigned to him by B. There was no reason why he should be allowed to interfere, He was a stranger to the transaction altogether. This case is entirely consistent with *Carne* v. *Brice* (1), which case indeed is cited as one of the grounds of the decision.

In *Edwards* v. *English* (3) the sheriff seized under an execution goods which were in the possession of the debtor. The claimant claimed under a registered bill of sale. He had, primâ facie, both the right of property and the right of possession, but the debtor had previously assigned the same goods by way of security to one Hatton, whose bill of sale was void against the execution creditor for want of registration, but good against the claimant, and had priority therefore as between Hatton and the claimant. This priority was doubted by Erle, J., upon what grounds we are unable to discover from the statement of facts in the report; but the decision, which was that the claimant was entitled to succeed, does not turn upon that doubt, and I treat Hatton's bill of sale as a good one; but the claimant's equitable title was perfectly good, subject to the prior security, and it was held that the objection that the claimant's title was merely equitable and not legal (see as to this objection *Roach* v. *Wright* (4), *Bird* v.

(1) 7 M. & W. 183.
(2) 9 Ex. 514; 23 L. J. (Ex.) 134.
(3) 7 E. & B. 564; 26 L. J. (Q.B.) 193.
(4) 8 M. & W. 155.

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Crabb (1)) was not admissible at that stage of the proceedings, per Crompton, J., at p. 567. Such an objection is now unavailable at any stage of the proceedings. The claimant was therefore entitled to succeed notwithstanding the earlier bill of sale. There is either a mistake in the report or an erroneous phrase in the judgment of Erle, J., as reported. He is made to say of *Carne* v. *Brice* (2), "In that case the proposed evidence would have shewn that the plaintiff had nothing whatever in the goods claimed." For "plaintiff" we should read "claimant," and the claimant was in *Carne* v. *Brice* (2) the defendant in the issue. But the decision itself seems to be entirely consistent with *Carne* v. *Brice* (2), and it was certainly intended to be so, for there is the distinct intimation of the Court that *Carne* v. *Brice* (2), *Chase* v. *Goble* (3), and *Gadsden* v. *Barrow* (4) are all in harmony with one another as well as with the decision then given.

In *Green* v. *Stevens* (5), which was decided less than a week before *Edwards* v. *English* (6), the real owner of the goods had lent them to the claimant, who had his permission to let them, as if the owner, to whom he would. The claimant let them on hire to the debtor. Her claim prevailed over that of the execution creditor on the ground that she had an interest in the goods, and it mattered not what its extent or nature was. Having an interest she was entitled to protect that interest by shewing that they could not lawfully be taken in execution. She had an interest sufficient to give her a lawful title to the possession and that was enough. That is exactly the "special property and right to possession" of Baron Parke in *Gadsden* v. *Barrow*. (4) Bramwell, B., put the case of a servant in possession of his master's property and parting with it to a stranger, in whose hands it should be seized in execution against the stranger. The servant in that case could not succeed against the execution creditor, because he would have no property at all in it. Surely the person whose only title to this property is that he has improperly concealed its existence from his trustee in bankruptcy can be no better off. He has no title of any kind to it. In *Green* v.

(1) 30 L. J. (Ex.) 318.
(2) 7 M. & W. 183.
(3) 2 M. & G. 930.
(4) 9 Ex. 514; 23 L. J. (Ex.) 134.
(5) 2 H. & N. 146.
(6) 7 E. & B. 564; 26 L. J. (Q.B.) 193.

Stevens (1) *Gadsden* v. *Barrow* (2) is cited as correct law. *Green* v. *Stevens* (1) was not cited to the Court in *Edwards* v. *English* (3), so that we have in them two independent authorities for the same proposition.

A case was cited to us from a very early volume of the *Law Times*, which was supposed to conflict with this current of authorities. We will only say that if we understand it rightly it proceeds upon the same lines, but the report is so very defective as to be all but unintelligible.

It was argued that the form of the issue in such cases had undergone a change somewhere about the year 1860 by the addition of the words "as against the execution creditor" after the question whether at the time of the seizure the goods were the property of the claimant, and that in consequence different considerations applied in the earlier cases, and that they were no longer applicable. These words, however, were certainly used in issues long before 1860; they are found in *Belcher* v. *Patten* (4), in which the issue was framed as early as 1847. They are treated in *Gadsden* v. *Barrow* (2) as making no difference, and it is clear that the question dealt with in every one of the cases we have discussed was the question of substance and not of form. We think there is nothing whatever in this objection, and that the principles which have been applied to the question under discussion for the last forty years at least have undergone no change.

We were referred lastly to a passage in the 3rd edition by Mr. Dixon of Lush's Practice (1865) at p. 780, certain phrases in which were said to favour the claimant's contention. To us it seems that the passage contains a very accurate summary of the cases, and that when it is carefully read it contains nothing which either is intended to conflict, or does in fact conflict, with the long series of authorities to which we have referred.

Much has been said in the course of this discussion and in some of the cases cited about the admission or rejection of evidence of the title of some third party, and about the onus of proof. It matters not what is the particular form in which the question

(1) 2 H. & N. 146.
(2) 9 Ex. 514; 23 L. J. (Ex.) 134.
(3) 7 E. & B. 564; 26 L. J. (Q.B.) 193.
(4) 6 C. B. 608; 18 L. J. (C.P.) 69.

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arises, and whether it is said that evidence of the adverse title should not be admitted, or that the adverse title when proved is of no avail to the party setting it up, the question of substance has always been the same. The question only arises where there is a really adverse title in a third party which, if that third party chooses to assert it, must prevail over that of execution creditor and claimant alike, but where that third party takes no step and does not seek to enforce his superior title, the decision in this case is, and that in every one of those which we have discussed, has been, in substance a legitimate application of the maxim potior est conditio defendentis.

We are therefore of opinion that this appeal must succeed, and judgment be entered in the court below for the defendant with costs, and that the defendant must have his costs of this appeal.

Judgment for the defendant. Leave to appeal granted.

Solicitors for claimant: *Carter & Church, for Evans & Sinnett, Llandovery.*

Solicitor for defendant: *White, for Richards, Swansea.*

R. B. R.

[IN THE COURT OF APPEAL.]

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May 22.

BLACKBURN, LOW, & CO. *v.* VIGORS.

Insurance (Marine)—Concealment—Principal and Agent—Concealment of Material Facts—Broker employed by Shipowner, but not being Broker through whom Policy effected.

A policy of marine insurance is vitiated by the concealment of a material fact by a broker employed by the assured to effect an insurance, although he is not the broker through whom the insurance is ultimately effected, and although the assured is innocent of all fraud.

So *held*, by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting.

Fitzherbert v. *Mather* (1 T. R. 12), *Gladstone* v. *King* (1 M. & S. 35), and *Proudfoot* v. *Montefiore* (Law Rep. 2 Q. B. 511) commented on.

The plaintiff instructed a broker to effect for him a re-insurance upon an overdue ship; whilst the broker was acting on behalf of the plaintiff he received information of a material fact tending to shew that the ship was lost; the broker did not communicate this information to the plaintiff, and failed to obtain an insurance for him. Afterwards the plaintiff, through another broker, effected a policy of insurance, lost or not lost, which was underwritten by the defendant. The ship had in fact been lost some time before the plaintiff tried to reinsure her, but neither the plaintiff nor the broker who effected the insurance, knew of or concealed from the defendant any fact tending to shew that the ship had been lost.

Held, by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting, that the plaintiff could not recover upon the policy underwritten by the defendant.

ACTION upon a marine policy of re-insurance, dated the 2nd of May, 1884, on the hull and machinery of the ship "*State of Florida*," lost or not lost. The defendant underwrote the policy for the sum of 50*l*.

The case was tried before Day, J., during Trinity Sittings, 1885, and the jury having been discharged, the learned judge ordered judgment to be entered for the plaintiff.

The facts of the case are sufficiently stated in the judgments of Lord Esher, M.R., and Lindley, L.J., hereinafter set forth.

The defendant appealed.

Feb. 27, March 1. *Sir C. Russell, A.G.*, and *Cohen, Q.C.* (*F. W. Hollams*, with them), for the plaintiff.

Sir R. E. Webster, Q.C., and *Gorell Barnes*, for the defendant.

The arguments are sufficiently noticed in the judgments already referred to.

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In addition to the authorities mentioned in the judgments *Williams* v. *North China Insurance Co.* (1) was cited during the argument.

May 22. The following judgments were delivered:—

LORD ESHER, M.R. The facts of this case necessary to be stated for the elucidation of the question which we have to decide, which facts were admitted or proved at the trial before Day, J., trying the case without a jury, are, that the plaintiff, trading as "Blackburn, Low, & Co.," carried on business at Glasgow as an underwriter and insurance broker, and that he had insured a ship, called the "*State of Florida*," for 1500*l.* from New York to Glasgow. The ship, which was a steamship, left New York on the 11th of April, and was due in ordinary course at Glasgow on or about the 25th of April. The ship was also underwritten for further amounts by or through "Rose, Murison, & Thompson," another firm of insurance brokers and underwriters in Glasgow, who were the usual insurance brokers for the owners of the "*State of Florida*." On the 30th of April, the ship being four or five days overdue, the plaintiff instructed his usual insurance brokers, Roxburgh, Currie, & Co., of London, to re-insure the ship for him to the extent of 1000*l.* at or not exceeding ten guineas. These brokers answered on the same day that the insurance could not be done under twenty guineas; to which the plaintiff replied: "not disposed to pay." And so by this answer the authority to Roxburgh, Currie, & Co., to insure for the plaintiff was for the time ended. In the meantime, on the 28th of April, information, which was admitted at the trial to be material, had been brought to Liverpool by a ship, called the "*City of Rome*." Before this information was known to any one in Glasgow, Rose, Murison, & Thompson, instructed their correspondents in London, Rose, Thompson, Young, & Co., to re-insure in London their existing insurances on the "*State of Florida*" to the extent of 1500*l.* at fifteen guineas, and some such re-insurances were in consequence effected in London. On the 1st of May, Mr. Thompson, a member of Rose, Murison, & Thompson, told the plaintiff in Glasgow that his firm had effected some insurances in London, and was thereupon requested by the plaintiff to

(1) 1 C. P. D. 757.

instruct Rose, Thompson, Young, & Co., of London, to reinsure 1500*l.* for him, the plaintiff. This request was forwarded by Rose, Murison, & Thompson as from themselves to Rose, Thompson, Young, & Co., at 11·30 on the 1st of May in the following terms: "Blackburn Low wish to reduce *Florida* lines, cover to them 1500*l.* at fifteen guineas net." The answer was, that this could not be done under twenty guineas. At 12·30 Mr. Murison, of Rose, Murison, & Thompson, had notice of the rumours which had reached Liverpool. He afterwards telegraphed, no longer in the name of his own firm, but in the name of the plaintiff's firm, to Rose, Thompson, Young, & Co., to offer twenty guineas. The answer came direct to the plaintiff. Further communications passed between the plaintiff and Rose, Thompson, Young, & Co., the rates continually rising. At 4·33 on the 1st of May, Rose, Thompson, Young, & Co. re-insured to 800*l.* for the plaintiff; but at 4·53, when the limit had risen to thirty-five guineas, the plaintiff closed his negotiations through Rose, Thompson, Young, & Co. by a telegram: "Not inclined to extend limit." At this moment, therefore, the plaintiff had no insurance broker instructed to act for him. On the 2nd of May the plaintiff sent new instructions to his usual brokers, Roxburgh, Currie, & Co., to re-insure 700*l.* on his behalf, which they effected on the same day at thirty guineas on the ship, lost or not lost, and which was the insurance sued upon in this action. It was at the trial admitted on behalf of the plaintiff that the request to Rose, Murison, & Thompson to instruct Rose, Thompson, Young, & Co. constituted Rose, Murison, & Thompson the plaintiff's agents to effect insurance for him. This authority lasted until the plaintiff was put into direct communication with Rose, Thompson, Young, & Co., when it of course ceased. In like manner Rose, Thompson, Young, & Co. were agents to the plaintiff to effect insurance for him until their authority ceased by reason of the plaintiff's refusal at 4·53 on the 1st of May to extend the limit given to them. The insurance, on which the action was brought, was effected through an entirely independent agent, Roxburgh, Currie, & Co., instructed after the authority given to the others had ceased. But it appears that the information from Liverpool was given to Rose, Murison, & Thompson, whilst by

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admission they were agents of the plaintiff to effect insurance for him. The ship was in fact lost before the policy sued on was effected. But it was admitted that the plaintiff himself had no knowledge of the information given at Liverpool until after the policy was effected; and it is clear, therefore, that he and the defendant and Roxburgh, Currie, & Co. negotiated and effected the insurance on the bonâ fide view by all of them, that the ship was no more than an overdue ship. No part of the negotiations with the defendant passed in any way through Rose, Murison, & Thompson.

The defendant relies on the want of communication to him of the information obtained by Rose, Murison, & Thompson of a material fact, which information came to them whilst they were agents of the plaintiff to effect insurance for him; and he insists on the application of a doctrine in the form that "the knowledge of an agent is the knowledge of his principal." The plaintiff insists that the only true doctrine is that the assured is bound by the knowledge of his agent who effects the insurance for him, or through whom the insurance is effected, as if he, the assured, had himself that knowledge at the time of the insurance; but that he is bound only to this extent, that in case of misconduct of the agent in effecting the insurance, he, the assured, cannot enforce the contract any more than if he himself had been guilty of the same misconduct. The question thus raised is really what is the true meaning of the phrase, "the knowledge of the agent is the knowledge of the principal"? Those who have used it could not have meant to say that what is known to an agent is necessarily in fact known to his principal; the phrase is only used in cases in which the principal is admitted to be in fact ignorant. The suggested meaning would therefore be an absurd contradiction of the assumption on which it is founded. The phrase is figurative. It was used by the first person who used it, as a means of expressing tersely the idea which that person intended to convey with regard to the case then before him. It has been used in the same sense by those who have subsequently adopted it in precisely the same or in similar circumstances. It is meant to be tersely descriptive rather than strictly accurate. One can only arrive at its more accurate and unfigu-

rative meaning by considering carefully the circumstances with regard to which it has been used by persons whose authority is to bind or guide us. By these observations I wish to guard against a danger which always arises from the use in law of these figures of speech. Their terseness prevents them, as I have said, from expressing accurately the proposition they are used to enunciate. They are generally larger than that proposition. If then the terse expression is afterwards applied as an accurate expression of a legal proposition, it may be, and often is, used so as to embrace a case which, if the limitations of the real proposition are called to mind, is seen at once to be outside the more limited boundaries of the more accurate proposition, though within the larger boundaries of the picturesque phrase. As examples of what I wish to convey, I will deal with some of these oracular phrases. For instance the following: "A man is taken to intend the natural consequences of what he does." If this were strictly adhered to, nine-tenths of the cases of manslaughter would be cases of murder; an unskilful doctor would be a murderer; and so one acting in an uncontrollable access of passion. The phrase therefore is evidently too large; if literally applied, it would often be wickedly untrue. But as soon as you see that it has been only used as a guide in questions of evidence you perceive at once that it expresses only a good working rule from which to draw an inference of intention, if no other evidence counteracts the primâ facie inference. When used by judges charging a jury it has always easily been understood in its more limited and accurate sense; when used by judges explaining the process of reasoning by which they have drawn a particular inference of intention, it has been used in the same sense; so the phrase: "A man is to be taken to know that which he wilfully abstains from knowing, or against which he wilfully shuts his eyes." It is a still more inaccurate phrase than the former; yet its meaning is sufficiently obvious. It cannot mean that a man does not know what he states he does know. It means that if a man asserts that he did not know a certain fact, and evidence is given which shews that he did know it, unless, if such a thing could be, he must have, what is picturesquely called, wilfully shut his eyes against the knowledge, the true

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inference is that, although he may not have been told the exact circumstances, or may not have seen with his eyes the exact details, he did in truth know the fact with his mind, as much as if he had been told or had seen every particular of it. Again, "A man who states that which is in fact untrue, reckless whether it is true or false, is to be taken to be malicious." It is a good working rule upon which primâ facie to found an inference of malicious intent; but the want of such an intention may be demonstrated by counter evidence, as that the story was carelessly told to amuse, or in order to divert from an apprehended danger, or otherwise. One has therefore to extract from such phrases the real legal proposition contained in them. In making this search, one must recollect that every general proposition laid down by judges, as a principle of law, as distinguished from an enactment by statute, is the statement of some ethical principle of right and wrong applied to circumstances arising in real life, that is, in the life of social intercourse or in the life of business. If the suggested principle is not obviously a rule of right and wrong, or if the suggested application cannot be supported by the suggested principle, the proposed application must be wrong, or must be supported by some other principle of right and wrong, or cannot be supported at all. These observations must be brought to bear upon the phrase with which we have to deal in the present case. That it expresses a properly limited proposition of law has been above alleged to be absurd. Let us try it in one or two obvious instances. It cannot mean that the law holds that the principal does in fact know what his agent knows, but what the law at the same time admits that the principal in fact does not know. The law is never founded on absolute nonsense. The law does not hold that for every purpose the principal is to be *deemed to know* whatever becomes known to an agent of his in the course of the agent's employment. A merchant sells goods at sea, or in warehouse, with a statement, not intended by him to be taken by the other party as a warranty, that the goods are sound. If, when he makes such statement, he knows that it is untrue, he is guilty of fraud. If he does not know or suspect the contrary of what he had stated, but his correspondent, or captain, or warehouseman does know the contrary, is the merchant guilty of fraud? Certainly not! Is he *deemed to be* guilty of fraud so as that an

action could be maintained against him to recover damages for a fraudulent misstatement? Certainly not! The principal does not, in fact, always know all that his agent knows. If the law held that he was in all cases for all purposes to be deemed to know all that his agent knew, the law would in some cases mark him with gross injustice, with an unwarranted stigma; the law would countenance a gross violation of a simple rule of right and wrong. The law does not deem that to be which in truth is not. All that the law does is that in some cases it regulates the rights and liabilities of a principal by the knowledge of his agent. But, then, it does so, not by virtue of a proposition that the knowledge of the agent is the knowledge of the principal, but upon another principle. In many kinds of contract, as of purchase and sale or hiring or letting, if a man, instead of himself negotiating and making the contract, intrusts those acts to an agent, he, the principal, cannot enforce the contract made on his behalf by his agent, if the contract is brought about by conduct of the agent, which would invalidate the enforcement of the contract, if the conduct had been pursued by the principal himself had he himself made the contract. If the agent procures the contract by fraudulent misstatement, or a misstatement, or by a fraudulent concealment, or by a concealment which makes false the statements he has expressly or impliedly made, such contract cannot be enforced by the principal. It is treated as void if sued upon at common law, or it is set aside upon application in equity. But under neither procedure could damages be recovered against the innocent principal upon an allegation of actual fraud by him. It is obvious, then, that the law does not say in such cases that the principal does know, or is to be deemed to know, what his agent knows. The principle of law applied to the case is a rule of right and wrong, immediately recognised to be just when it is stated, that a man cannot, by delegating to an agent to do what he might do himself, obtain greater rights than if he did the thing himself. This rule and its application is obvious, and was as well known and applied before as after the phrase now in question was invented, namely, that "what is known to an agent is known to his principal." This phrase, when examined, is seen to contain no principle of law whatever. In insurance law, if a

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contract of insurance is made directly between an assured and an underwriter, the contract cannot be enforced if, in the course of the negotiations, the assured has made a misstatement of a material fact, whether he has done so fraudulently or innocently, or if he has concealed a material fact, known to himself and not known to the underwriter, or which the underwriter ought to have known, whether he, the assured, has done so fraudulently or innocently. If, then, the agent of the assured to make the contract of insurance does that which, if the assured himself had done it, would have precluded him from insisting on the contract, the application of the principle above enunciated will prevent the principal from, in such case, being able to insist on the contract. The result is not the consequence of the phrase treated as a principle of law, though the phrase, in a certain sense, makes a sufficient picture of the result. The principle which is applied is one which can only be applied to the conduct of an agent by or through whom the contract is made, although the phrase in its terms would apply to other agents. Apply the phrase to other agents, as if it were a principle of law, and it will be seen to produce as manifest injustice in the case of insurance principals and agents, as it has been shewn it would produce in other cases. This alleged principle is not the law of England in any case, although in the case of certain agents the principal is held to warrant the honesty of the agent, and is thereby liable in respect of the agent's dishonesty. From these observations the conclusion is, that the phrase in question cannot really be used as a guide to determine the question of the defendant's liability or non-liability in the present action. We must seek elsewhere for the principle which is to govern the case. We have to see whether any true principle of insurance law will make the defendant liable in the present case. In order to determine this question, we must see what circumstances have been held to prevent the enforcement of a contract of insurance, and what are the principles under which those circumstances have been held to have that effect. Then we shall see whether any of those principles are applicable to the circumstances of the present case. Mr. Arnould, on Marine Insurance, vol. 1, part 2, ch. 1, s. 2, par. 196, pp. 547, 548, (2nd ed.), says that "the principle is now

firmly established that the misrepresentation from mistake, ignorance, or accident of any material fact, however innocently made, will avoid the policy quite as much as in cases where such misrepresentation arises from a wilful intention to deceive." And in another place (vol. 1, part 2, ch. 2, s. 1, par. 208, p. 584 (2nd ed.)): "Concealment in the law of insurance is the suppression of a material fact within the knowledge of either party, which the other has not the means of knowing, or is not presumed to know." "Whether such suppression of the truth arise from the fraud of the assured (that is, from a wilful intention to deceive for his own benefit), or merely from mistake, negligence, or accident, the consequences will be the same." The substantial truth of these propositions is not disputed by any one. They are a statement of the circumstances which will prevent the enforcement of the contract, but they do not contain the principle whereby such circumstances produce such an effect. As to this, Mr. Arnould on Marine Insurance, vol. 1, part 2, ch. 1, s. 2, par. 196, p. 548 (2nd ed.), says: "The doctrine of the English Courts is, that in the case supposed, although no pretence exists for alleging actual fraud, yet the policy is to be considered void on the ground of constructive or legal fraud." This is directly in contradiction of what has been said in the former part of this judgment. Duer, however, as is well known, does not adopt this principle, but holds that it is a part of the contract that full disclosure shall be made, as well as that every representation shall be accurate. But if this be correct, the contract should never be set aside or treated as void on the ground of concealment; the contract should stand and be treated as broken by the assured. This view would raise new complications which have never yet been urged. Phillips, who is in my opinion always the more accurate guide, thus treats the matter of principle, see § 537: "The effect of a misrepresentation or concealment in discharging the underwriters does not seem to be merely on the ground of fraud, as has been usually laid down by writers on insurance, but also on the *ground of a condition* implied by the fact of entering into the contract, that there is no misrepresentation or concealment. Mr. Duer criticises the phraseology of the books in putting the effect of a misrepresentation or concealment upon the contract entirely upon the ground of fraud.

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Mr. Arnould adheres to this application of that term for the sake of consistency with the general legal doctrine, that what passes between the parties preliminary to a contract is not a part of it and should not be imported into it. And since a representation through mistake or inadvertence has the same effect, in reference to the underwriter, as an intentional and literally fraudulent misrepresentation or concealment—namely, it induces him to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded—he deems it to be excusable to apply the term 'fraud,' and thus bring the doctrine on this subject nominally within the acknowledged general principle applicable to other contracts. *But I cannot think that this anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, and least of all in that of law, where it can possibly be avoided*, as it may easily be in this case by stating the practical doctrine in direct terms, namely, that it is an implied *condition* of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake." He says lower down: "The forfeiture of the insurance by misrepresentation or concealment is a forfeiture by a breach *of a condition* of the contract. So it seems to have been considered by Chancellor Kent."

This seems to me to be the true doctrine. The freedom from misrepresentation or concealment is *a condition* precedent to the right of the assured to insist on the performance of the contract, so that on a failure of the performance of the condition the assured cannot enforce the contract. I have thought it necessary to bring out this view, because it seems to me that the only persons who can attach a condition to a contract are those who in fact make the contract. Those who have nothing to do with the making of the contract, cannot have anything to do with agreeing to a condition which is to affect the attaching of the contract. He who makes the contract agrees to the condition that it shall not be binding if he, or the person whose alter ego or representative he is, has made any misrepresentation or has been guilty of any concealment. This confines the purview of alleged misrepresentation or concealment to those persons only. It confines the consideration of an agent's conduct to the conduct of the agent by or through whom the contract

is made. Mr. Arnould, on Marine Insurance, vol. 1, part 2, ch. 1, s. 2, par. 202, p. 563 (2nd ed.), uses the phrase: "The principle here is that what is known to the agent is impliedly known to the principal." But this is applied to the immediately preceding paragraph, which is: "If however the information so communicated by the assured to the underwriter proceeds from an agent to the assured, whose *duty it was to give the intelligence*, the assured is just as responsible for the truth of the information as he would be for the truth of a positive representation made by himself of the same facts." It seems to me that the phrase "the agent whose duty it was to give the intelligence" means in this context, the agent whose duty it was to give the intelligence *to the underwriter*, that is, it means the agent who effects or through whom is effected the contract of insurance. And if so, the phrase as to knowledge is not wanted as a principle; there is another governing principle which suffices. Duer on Marine Insurance, vol. 2, lecture 13, part 1, discusses the cases of *Fitzherbert* v. *Mather* (1) and *Gladstone* v. *King* (2), and then states (s. 26, p. 418) that "to these decisions, if they are to be considered as affirming the rule, that the knowledge of an agent not authorized to insure, may in some cases be justly imputed to his principal, so that his silence shall have the effect of a concealment avoiding the policy, or exonerating the underwriters from the loss, the reasoning and authority of a very eminent judge, distinguished for his accurate and profound knowledge of commercial law" (referring to Story, J.), "are directly and irreconcilably opposed." Duer, in s. 28, p. 421, gives his own view; but it is based entirely on his view that it is part of the contract not by way of condition but by way of contractual undertaking that no concealment of any kind shall occur. It will be found that Phillips, in his italicized propositions, which, in my opinion, are always nicely accurate, confines himself entirely to the acts or omissions of agents by or through whom the contract is effected. See § 543: "A misrepresentation or concealment by the agent for effecting the insurance will defeat it, though not known to the assured." It is clear, I think, that in § 549 he prefers the reasoning of Story, J., in *Ruggles* v. *General Insurance Co.* (3) to that of the English judges, as

(1) 1 T. R. 12. (2) 1 M. & S. 35. (3) 4 Mason, 74.

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reported, in *Fitzherbert* v. *Mather* (1) and *Gladstone* v. *King*. (2) And I think that the concluding paragraph of that section is rather forced from him by those cases than acquiesced in by his conviction. "*I accordingly cannot but conclude*," he says, "that a policy made, as the case supposes, under an essential misunderstanding by both of the parties, into which they are purposely and fraudulently led by a third, whether he be an agent of one or both or neither, is void." I do not think that the mind of the writer went with that halting proposition. But then another rule is suggested in argument, partly countenanced by Arnould and Duer, though they seem to base it on the English cases of *Fitzherbert* v. *Mather* (1) and *Gladstone* v. *King* (2) rather than on any process of reasoning, and it seems to be this: "Where any servant or agent of the assured ought by reason of the duty imposed upon him by his position with regard to the assured to make to him a true and immediate communication of a circumstance, which in insurance law is a material circumstance, and if he, neglecting such duty, either makes a false communication or fails to make an immediate communication, or any communication at all to his principal or employer, and by reason thereof, the principal or employer, the assured, fails to disclose that which, if he had known it, he would have been bound to disclose, the contract of insurance cannot be enforced." This suggested rule would be well founded if the phrase, that the knowledge of the agent is the knowledge of the principal, were a legal proposition; but it is not. To support the rule some principle must be vouched. The rule contains two assertions on which it is based; the first, that there are servants and agents of the assured who, by reason of their position *as such*, are bound to give, not only true but immediate communication of certain facts. The second is that the underwriter has a right to assume, as the foundation of his contract, that such servants and agents have fulfilled the suggested duty. As to the first, no one doubts but that it is the duty of a servant or agent, as it is of every one who makes a statement, to make it truthfully; but is it true to say that all servants and agents are, or even that any servant or agent is bound, *by reason only of his relation as such to his employer*, to

(1) 1 T. R. 12. (2) 1 M. & S. 35.

make an immediate communication of everything that has happened concerning his principal's affairs? I know of no such duty arising from the mere relation of master and servant or of principal and agent. A manager of a mercantile establishment in a distant country probably makes only periodical reports. There is no apparent necessity for his making more frequent reports. There is no necessary reason why the captain of a ship should *immediately* report every accident to the ship, which accident would usually be already repaired. The law has no right to imply a duty as attached to the relation, which does not necessarily follow from the relation. The supposed duty must exist whether the subject-matter is or is not insured or is or is not to be insured. There is nothing on which to found the suggested implied duty. I feel certain that no such duty does in fact generally exist. As to the second, even supposing that such an implied duty does exist as between master and servant or principal and agent, is it true to say that underwriters do rely upon an undertaking by the assured that his servants or agents will fulfil their duty? Such a reliance has never yet been proved in fact to be the rule of underwriters and assured. I believe it to be incapable of proof, because it is wholly untrue in fact. The underwriter has been taught to rely, and does rely, upon the conduct of those with whom he deals, not upon the conduct of those with whom he has no relation, and of whose existence in many instances he knows and can know nothing. He is entitled to uberrima fides from those with whom he deals. But the doctrine of uberrima fides is fulfilled completely if those with whom he deals deal with him in accordance with that rule. The suggested doctrine strikes an assured who has complied in every possible sense with that exceptional rule of conduct of uberrima fides. A Court of law has no right to imply this reliance of an underwriter unless the implication is a necessary implication.

It remains only then to deal with the cited cases, and to deal with them in a Court of Error, where they are not to be followed or distinguished, but to be considered. And it may be well to observe that they do not construe a contract or document so that whether right or wrong other contracts and documents have been formed upon them, but lay down, as it is said, principles of law.

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And, further, they have never been absolutely acquiesced in, but have been canvassed and criticised from the time they were decided until now. The case of *Fitzherbert* v. *Mather* (1) is difficult to appreciate so far as consists in gathering the principle which ought to be extracted from it, on which the judges founded their decision. I confess that the reported judgment of Buller, J., puzzled me for long. I think I now understand it from the gloss put upon the Judge's phraseology by Duer on Marine Insurance, vol. ii. in note 11 to lecture 14, p. 790: "Buller, J.," he says, "is still more explicit. Though the plaintiff be innocent, yet if he build his information on that of his agent" (which clearly means if he adopt the information of his agent, and by *submitting it to the underwriters* makes it the foundation of the contract), "and his agent be guilty of a misrepresentation, the principal must suffer." The gloss within the brackets, which I think is correct, shews that the case was decided on the view that the assured, who himself made the contract, made a representation, which was a misrepresentation into which he, the assured, was led, by adopting and using innocently the misrepresentation of his agent. If this be the true interpretation of the case, it is in no way exceptional, but is within the most ordinary rule of insurance law. The case of *Stewart* v. *Dunlop* (2) is founded entirely on an inference of fact, more or less rightly inferred, that the agent who effected the insurance knew the information which had arrived in the town. As to the case of *Gladstone* v. *King* (3) it is one of those cases which is differently explained by every one who deals with it. Every one points out that the resulting decision, that the fraud of the master did not avoid the policy but only exonerated the underwriter from payment of the average loss incurred before the policy, is strange and isolated. Duer doubts whether the letter written by the captain to his owners was not shewn by the assured to the underwriters. If it was, it is again a case of innocent misrepresentation by the assured himself. The case is criticised by Phillips in § 683. The reasoning of Story, J., in *Ruggles* v. *General Interest Insurance Co.* (4), seems to me to dispose of all that has been supposed to result from the

(1) 1 T. R. 12.
(2) 4 Bro. P. C. 483.
(3) 1 M. & S. 35.
(4) 4 Mason, 74.

case of *Gladstone* v. *King*. (1) He first gives strong reasons for supposing that the case was in reality decided as upon an innocent misrepresentation. If not, he (on p. 78) deals with the suggested reasoning. "The principle contended for," he says, "is new. If well founded it must have often occurred. The general silence, therefore, is against it, but not decisive of its merits. Upon what grounds does it stand? Not upon the ground of agency, for the master was not the agent as to the insurance. Not upon the ground of imputed knowledge or fraudulent concealment, for that is excluded by the argument. It must then be upon the ground that the act of the master binds the owner, and that an omission of duty to his owner, by which third persons are prejudiced, destroys the rights of his owner, however innocent he may be. There is certainly no public policy or convenience in such a principle. The owner does not guarantee the fidelity of the master to all the world, or to the insurer in particular." In this, as matter of truth and real business conduct, I entirely agree. I see no warrant for any other inference. I think it more candid to say at once that in my opinion *Gladstone* v. *King* (1), as reported, and certainly as relied on, is wrong. I do not think that an assured can properly be said to guarantee the fidelity of any of his agents. Certainly I cannot bring my mind to say that the underwriter is to be assumed to rely upon the diligence and accuracy of an agent of the assured, of whose existence, as in this case, he could not have had a suspicion. Even if what is said about a captain or correspondent were true, which I think it is not, the present case goes far beyond; for the defendant, the underwriter, had no reason to suppose that any other agent had been instructed to insure. I am prepared to decide this case upon the old, simple, recognised and easily justified rule, that a contract of insurance is rendered abortive by an innocent misrepresentation or concealment of a material fact known to the assured, or to an agent of his by or through whom the contract is made, and which fact the underwriter neither knows or is bound to know, but is not rendered abortive by the misrepresentation or concealment of any other person or agent, whether innocent or fraudulent. I can find a simple principle to

(1) 1 M. & S. 35.

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support the first, namely, the principle I have before stated, that a man cannot by delegating to an agent to do what he might do himself, obtain greater rights than if he did the thing himself. I can find no principle on which to support the contrary of the second.

There remains the case of *Proudfoot* v. *Montefiore* (1), which, on account of its importance, I reserved for minute consideration until after I had exhausted principle and all other authorities. It is made in the judgment to depend on the cases of *Fitzherbert* v. *Mather* (2), and *Gladstone* v. *King*. (3) "Upon the above facts," the judgment says (p. 519), "the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo, as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defence to the underwriter on a claim to enforce the policy. Two cases decided in this Court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, establish the affirmative of this proposition."

I have already endeavoured to shew that *Fitzherbert* v. *Mather* (2) does by no means support this proposition. If *Gladstone* v. *King* (3) does support it, I must say that, as I cannot agree with that case so interpreted, I cannot agree with this case founded on it. The Chief Justice then states that the reasoning of Duer fully established that the judgment of Story, J., in *Ruggles* v. *General Interest Insurance Co.* (4) is erroneous. If Mr. Duer's view is right that there is a contractual undertaking by the assured that every material fact shall be disclosed, it follows of course that Story, J., is wrong. But, as I have said, I look in vain in a policy in ordinary form for any such contract. The Chief Justice then lays down the following proposition (p. 521): "If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such

(1) Law Rep. 2 Q. B. 511.
(2) 1 T. R. 12.
(3) 1 M. & S. 35.
(4) 4 Mason, 74.

insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have knowledge; and that the latter will take the necessary measures by the employment of competent and honest agents to obtain, though the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

Now I will again examine the different parts of this proposition. The duty relied upon—namely, that of communication by an agent or servant—cannot be a duty imposed in a particular case by a specific order of the owner to his servant or agent, for if so, the alleged infirmity in the policy will depend upon whether such order has or has not been given; it must therefore be a duty, if any, held to arise in contemplation of law necessarily by reason of the relation between owner and agent. And, as I have before stated, the alleged duty is useless for the purpose for which it is suggested, unless the duty is a duty to give immediate information. I know of no such implied duty. I know of no agent or servant of a shipowner, still less of an owner of cargo, whose implied duty it is by any implication which a Court is justified in making, to communicate immediate information of every or of any accident happening to the ship or cargo in the course of a voyage. The proposition is again, I venture to say, obviously inaccurate in coupling concealment and misrepresentation as if the doctrines of insurance law were identical as to both. If the owner makes a representation, the policy no doubt cannot be enforced, however much the owner may have been misled into making the representation. But with regard to concealment, in the sense of mere non-disclosure, the law is not the same as in the case of misrepresentation. The proposition then states (p. 521): "that the insurer is entitled to assume, as the basis of the contract

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between him and the assured, that the latter will communicate to him every material fact of which the assured has knowledge." This is undoubtedly correct, it being the necessary consequence of the doctrine of uberrima fides. But the proposition proceeds: "That the insurer is entitled to assume that the assured will communicate to him every material fact of which the assured ought in the ordinary course of business to have knowledge." This branch assumes that the assured has not the knowledge; the doctrine of uberrima fides therefore does not reach it; why the insurer has a right to assume that the assured will communicate to him what the assured by the hypothesis does not know, is a proposition which passes my comprehension. The proposition then lays down, that the insurer has a right to assume that the assured will take the necessary measures by the employment of competent and honest agents to obtain all due information. But the proposition by using the phrase, "the necessary measures," assumes that although the assured has taken every reasonable or even possible measure to employ competent and honest agents, he may have failed to succeed, and therefore have failed to take "the necessary measures." And it fails to touch the case of there being by accident or momentary negligence of the agent a failure, although the agent is in every sense a competent and honest agent.

It seems to me that this whole proposition is a finely written deduction from the case of *Gladstone* v. *King* (1); but that as a business or legal proposition it will not bear close examination.

It is further suggested in this case of *Proudfoot* v. *Montefiore* (2) that the proposition laid down in it rests on a ground of public policy. But in the first place it seems difficult to see how public policy can be affected by any circumstances relating to the power between the parties of enforcing or repudiating a contract of insurance any more than of any other contract; and, secondly, it seems difficult to reconcile the interference of the doctrine of public policy in the case of a contract of insurance on ship or goods, lost or not lost, one step beyond affirming that the parties who are allowed by law to enter into this hazardous and well nigh gambling speculation of whether a loss has or

(1) 1 M. & S. 35. (2) Law Rep. 2 Q. B. 522.

has not already happened must be equally informed or equally ignorant.

I am for all these reasons of opinion that in this case the plaintiff was entitled to recover, and that the appeal should be dismissed.

LINDLEY, L.J. This was an action brought on a policy of insurance on the steamship *Florida* (lost or not lost) subscribed by the defendant, and dated the 2nd of May, 1884. The claim was for a total loss by perils of the sea; and the material defence was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs or their agents and unknown to the defendant.

The case was tried before Day, J. At first there was a jury, but the jury were discharged by consent; the defendant by his counsel electing not to go to the jury on the question whether the plaintiffs themselves concealed any information known to them; the defendant was content to rest his defence on the undisputed facts, and on the point of law arising from them Day, J., gave judgment for the plaintiffs for the whole sum claimed.

The undisputed facts of the case were as follows:—

The plaintiffs were underwriters and insurance brokers at Glasgow, and were underwriters of a policy on the ship. The policy had been effected by the owners of the ship through Rose, Murison, & Thompson, of Glasgow, who were the brokers for effecting insurances upon her. The ship had left New York on the 11th of April, 1884, and was due at Glasgow on or about the 25th. The ship not having arrived, the plaintiffs, desiring to protect themselves from loss, endeavoured on the 30th of April to effect a reinsurance. They first attempted to do this through Roxburgh, Currie, & Co.; but, the terms being too high, no insurance through them was then effected. The next day, viz., on the 1st of May, Mr. Low, one of the plaintiffs, saw Mr. Thompson, a member of the firm of Rose, Murison, & Thompson, and asked him about the ship and requested him to telegraph to the London agents of his firm, viz., to Rose, Thompson, Young, & Co., to effect an insurance for 1500*l.* at fifteen guineas; and a

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telegram to this effect was accordingly sent by Rose, Murison, & Thompson, of Glasgow, to Rose, Thompson, Young, & Co., of London, between 11 and 12 o'clock. At 12·30 on the same day, a Mr. Murray gave Murison important information brought to Glasgow by another ship, and which information was calculated to excite suspicion of the loss of the *Florida* some days previously. It was afterwards proved that this suspicion was well founded, and that the *Florida* had in fact been lost some ten days previously. The information thus communicated by Murray to Murison was communicated to him because Rose, Murison, & Thompson were brokers to the ship and had, as already stated, effected insurances upon her. The information thus obtained by Murison was never disclosed by him to the plaintiffs; and having regard to what took place at the trial, the plaintiffs themselves must be assumed to have known nothing whatever about the matter, and to have concealed nothing themselves. Shortly after the above interview Rose, Thompson, Young, & Co. (of London), telegraphed to Rose, Murison, & Thompson (of Glasgow): "Twenty guineas paying freely and market very stiff—likely to advance before day is out." This telegram was shewn to the plaintiffs. Rose, Murison, & Thompson then telegraphed back, not in their own names but in the names of the plaintiffs, to Rose, Thompson, Young, & Co.: "Pay 20." The plaintiffs being thus put in direct communication with Rose, Thompson, Young, & Co., received a telegram back to the effect that nothing could be done for less than twenty-five guineas; but ultimately the plaintiffs effected an insurance through Rose, Thompson, Young, & Co. for 800*l.* at twenty-five guineas. This however is not the policy sued on in this action. On the same 1st of May, and after the plaintiffs had been put in direct communication with Rose, Thompson, Young, & Co. and had been told by them that nothing could be done for less than twenty-five guineas, the plaintiffs effected another insurance on the *Florida* through Roxburgh, Currie, & Co. for 500*l.* at twenty-five guineas. This again is not the policy in question in this action. On the next day, viz., the 2nd of May, the plaintiffs, through Roxburgh, Currie, & Co., effected a further insurance with the defendant for 700*l.* at thirty guineas; and this is the policy on which this action is brought.

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The defendant resists payment on the ground that he was not informed of the facts which had been communicated to Murison by Murray on the 1st of May, and which it was admitted were material to the risk. The plaintiffs' counsel conceded that if the plaintiffs had themselves known of these facts and had concealed them from the defendant, he would not be liable on the policy. The plaintiffs' counsel further conceded that if the policy in question had been effected through Rose, Murison & Co., and they had concealed from the defendant the information given by Murray to Murison, the defendant would not be liable to the plaintiffs on the policy. But the plaintiffs' counsel contended that as the plaintiffs themselves acted in good faith and in ignorance of the facts disclosed to Murison, and did not effect the policy sued on through him or his firm, but through other agents who knew no more than the plaintiffs themselves knew, the plaintiffs are entitled to recover on the policy. This was the view adopted by the learned judge who tried the action.

The defendant, on the other hand, contends that the knowledge acquired by Murison whilst he was endeavouring to effect an insurance for the plaintiffs, must in point of law be imputed to them; and that as between the plaintiffs on the one side and the defendant on the other, the plaintiffs, rather than the defendant, must suffer from the omission on the part of Murison to communicate what he knew to the plaintiffs. In support of this contention certain authorities were referred to which it is necessary to examine.

The first is *Fitzherbert* v. *Mather*. (1) That was an action on a marine policy on a cargo of oats (lost or not lost) belonging to the plaintiff. The policy was effected through a person of the name of Fisher. The oats were bought by Bundock, acting for the plaintiff, from a person named Thomas, who shipped them, and who by Bundock's orders sent a bill of lading and invoice to Fisher. Thomas also wrote to Fisher, stating that the oats had been shipped, and that the vessel, on board which they were, had sailed. After this letter was written, but before it could have left the town where it was posted, Thomas learned that the vessel was lost. But he said nothing about it, and sent no further letter,

(1) 1 T. R. 12.

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and Fisher knew nothing of the loss. He acted bonâ fide, and effected the insurance after he had received Thomas's letter above alluded to. It is not stated that this letter was shewn to the defendant, although there is some reason for supposing that it was. But even if it was not, still the information on which Fisher acted was obtained from Thomas, who was directed by Bundock, and, it would seem, also by the plaintiff, to communicate with Fisher; and Thomas wrote to Fisher expressly that he might insure if he liked. Moreover, the plaintiff himself instructed Fisher to insure as soon as the bills were sent him. The Court construed this as meaning as soon as they came from Thomas. The Court appear to have come to the conclusion that the plaintiff referred Fisher to Thomas for information, and thereby in effect through Thomas supplied Fisher with defective information. The Court held that the policy was effected by misrepresentation; that Thomas had been guilty, if not of fraud, at least, of great negligence; that the concealment by him from Fisher, and therefore from the underwriter, of the loss of the oats vitiated the policy, although both the plaintiff and Fisher acted in perfect good faith. It is to be observed that Ashurst, J., decided this case on the ground that Thomas's knowledge was to be treated as the knowledge of the plaintiff: but the rest of the Court seem to have treated the case as one of direct misrepresentation, though an innocent one so far as the plaintiff and Fisher were concerned.

The next case is *Gladstone* v. *King*. (1) This was an action on a policy on a ship lost or not lost. The plaintiffs were her owners, and they claimed to recover damages for an injury sustained by the ship by getting on a rock before the policy was effected. The captain of the ship had written to the plaintiffs after the accident and before the policy was effected, but he had not alluded to the accident, and the plaintiffs knew nothing of it until after the ship arrived home. The Court nevertheless decided that the plaintiffs could not recover. The Court held that it was the duty of the captain to inform the plaintiffs of the fact that the ship had been on a rock, and sustained injury, and that his omission in this respect by means of which the owners were prevented from

(1) 1 M. & S. 34.

disclosing the accident to the underwriters operated as an exception of that particular risk out of the policy. Lord Ellenborough, in this case, appears to have been influenced by the consideration of the danger there would be to underwriters if captains were permitted to wink at accidents without hazard to the owners, and so always enable them to throw past losses on insurers. This case certainly went beyond *Fitzherbert* v. *Mather* (1); for the captain had nothing to do with the insurance, and he was not referred to by the plaintiffs for information. What, however, he knew was treated as impliedly known to the plaintiffs, although he did not tell them what he knew.

The next case is *Proudfoot* v. *Montefiore*. (2) It was an action on an agreement to insure some madder belonging to the plaintiff. Rees was the plaintiff's agent at Smyrna to buy and ship madder for him; and Rees had bought and shipped for the plaintiff a cargo of madder on board a vessel which was lost soon after she sailed. Rees knew of the loss, and might have informed the plaintiff of it by telegram, but he purposely refrained from doing so in order that the plaintiff might be able to insure in ignorance of what had occurred. The plaintiff did in fact insure the cargo before he knew of the loss, and the slip was signed by the defendants in ignorance of what had happened. The Court decided against the plaintiff although he personally had acted in good faith, and had concealed nothing within his personal knowledge. The grounds of the decision are given on p. 521, and are as follows: "Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the cases of *Fitzherbert* v. *Mather* (1) and *Gladstone* v. *King* (3) were well decided; and that if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to

(1) 1 T. R. 12.

(2) Law Rep. 2 Q. B. 511.

(3) 1 M. & S. 35.

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him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it. It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage, which he has paid to secure, by the misconduct of his agent. But to this there are two answers: first, that, as we have already pointed out, the implied condition on which the underwriter undertakes to insure —not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured, shall be made known to him—is not fulfilled; secondly, as was said by the Court in *Fitzherbert* v. *Mather* (1), where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed. By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals, as also any tendency on the part of principals to encourage their servants and agents so to act."

The last authority, which it is necessary to refer to, is *Stribley* v. *Imperial Marine Insurance Co.* (2) It was an action by the owners of a ship for a total loss; and one point raised was, whether the fact, that the captain had not informed the plaintiff, and that he therefore had not informed the defendants of the fact that the vessel had encountered a storm and lost an anchor before the policy was effected, vitiated the policy. It was held that it did

(1) 1 T. R. 12.

(2) 1 Q. B. D. 507.

not. I understand this decision as in substance similar to *Gladstone* v. *King*. (1)

The principle on which *Fitzherbert* v. *Mather* (2) and *Gladstone* v. *King* (1) are based, has been much discussed; and, as stated by the Court in *Proudfoot* v. *Montefiore* (3), Mr. Justice Story in *Ruggles* v. *General Interest Insurance Company* (4) declined to follow it. His view, however, is opposed to that of the Supreme Court of the United States (12 Wheaton, 408), and to that of Phillips, s. 549, and Duer, and has not been adopted in this country. It appears to me to be established by the cases to which I have referred, that in order to prevent fraud and wilful ignorance on the part of persons effecting insurances, no policy can be enforced by an assured who has been deliberately kept in ignorance of material facts by some one, whose moral if not legal duty it was to inform him of them, and who has been kept in such ignorance purposely in order that he might be able to effect the insurance without disclosing those facts. The person who allows the assured to effect a policy under such circumstances as I am now supposing, does not act fairly to the underwriters; and although such person may owe them no legal duty, the assured cannot in fairness hold the underwriters to the contract into which they have in fact entered under these circumstances. The assured may himself be perfectly innocent when he effects the insurance; but as soon as he is informed of the facts, it ceases to be right on his part to take advantage of the concealment without which that insurance would not have been effected. In other words, the assured cannot take advantage of the ignorance in which he has been improperly kept by one who ought to have told him the truth. If it was the legal duty of the person who has so kept him in ignorance to inform him of the facts concealed, it is, I think, clearly settled that he cannot avail himself of his own personal ignorance of them. But if there is no such legal duty to him, the same consequence appears to me to follow if there was a moral duty to tell him the truth. He may exclude all legal duty to be informed of what has occurred by giving instructions dispensing with information; and such instructions may be

(1) 1 M. & S. 35.
(2) 1 T. R. 12.
(3) Law Rep. 2 Q. B. 511.
(4) 4 Mason, 74.

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given for reasons which exclude all inference of fraudulent intent on his part. But in such a case it appears to me that he cannot enforce a contract of insurance obtained by such unfair means as those supposed. In my opinion Duer, vol. ii. 647, and Phillips, vol. i. s. 537, are both right in contending that fraud on the part of the assured is not essential to discharge the underwriters on the ground of misrepresentation or concealment. It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by anyone who ought as a matter of business and fair dealing to have stated or disclosed the facts to him or to the underwriter for him.

If this view of the law be correct, it follows that the plaintiffs cannot recover in this action. The omission of Murison to tell the plaintiffs what he knew, and the remarkable course his firm took of discontinuing negotiations themselves, and of putting the plaintiffs in direct communication with Rose, Thompson, Young & Co., are only to be explained upon the theory, that the plaintiffs were purposely kept in ignorance in order that they might insure on more favourable terms than they otherwise might have done. It appears to me to have been clearly Murison's duty to the plaintiffs to give them the information he had, so that they might by disclosing what they knew and increasing their offer, cover the increased risk. Murison was not a stranger under no obligations to the plaintiffs. He was employed by them to effect an insurance, and whilst so employed he acquired important knowledge respecting the ship. I cannot doubt that it was his duty to disclose this to the plaintiffs, and not to let them go on to insure in ignorance of what it was of the utmost importance they should know. The plaintiffs cannot in my opinion obtain any advantage from this breach of duty to themselves. As between themselves and the defendant, the plaintiffs are the persons to suffer from the mistaken view their own agents took of their own duty. Their conduct vitiates this policy, although it was not effected through them nor until after their agency had ceased; for had it not been for their breach of duty, the policy could never have been effected for the premium which the plaintiffs paid. I have not based my judgment on the maxim that the knowledge of an agent is the knowledge of his principal; for

like the Master of the Rolls, I distrust such general expressions, which are quite as likely to mislead as not. But for the reasons I have stated the decision of Day, J., was in my opinion erroneous, and judgment ought to be entered for the defendant, with costs here and below.

LOPES, L.J. I have arrived at the same conclusion as Lord Justice Lindley, but the case is so important that I wish to give a separate judgment stating my reasons.

It is unnecessary to state the facts of this case. They have been already fully stated, and are undisputed. I purpose shortly to state the conclusion at which I have arrived after much consideration, and my reasons for that conclusion.

It is clear law that if the policy sued in this action had been effected *through the agents* to whom the material communication was made, and who suppressed it, the assured, though ignorant of the communication, could not have recovered from the underwriters, because there had been a concealment of a material fact by the agent of the assured. The knowledge of the agent in such circumstances would be the knowledge of the principal—a phrase which I understand to mean that the principal is to be as responsible for any knowledge of a material fact acquired by his agent employed to obtain the insurance, as if he had acquired it himself.

In what does the present case differ from the one above stated, where the law is clear? It differs only in this, that here the policy was effected not through the agent, who had acquired and concealed the information in order that his principal might effect an insurance upon favourable terms, but through another agent subsequently employed, who as well as his principal was innocent of any previous concealment.

The plaintiffs' contention is, that it is only the concealment of material facts by the agent who effects the policy that vitiates it, not the concealment by any other agent. And the learned judge in the court below so held. The question raised seems to be whether if an agent employed to effect an insurance purposely omits to communicate material facts, which came to his knowledge during his employment, (facts which it was his duty to

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communicate to his principal,) it is a concealment which will avoid an insurance effected by an innocent principal through another agent, ignorant of any such concealment. Authority and principle compel me to answer that question in the affirmative.

I will first deal with the authorities. The earliest case is *Fitzherbert* v. *Mather*. (1) In that case it seems to have been held, that where the conduct of the assured was wholly free from blame or suspicion, his policy was avoided by the concealment and virtual misrepresentation of an agent who had no authority to procure or direct the insurance. He was the consignor and shipper of the goods insured. The judges thought the letter was a misrepresentation. The Court clearly thought that it was the duty of the agent to have given information of the loss. The *concealment of the agent was the ground* of the decision. The assured was held to be affected by the concealment of an agent other than an agent employed to obtain an insurance.

The next case is *Gladstone* v. *King*. (2) The insurance was on a ship on a specified voyage, it was made after the risks had commenced, but by its terms (lost or not lost) it related to their commencement, and covered all prior losses. When the policy was effected, no such loss was known to the owners to have occurred; but a partial loss had in fact occurred, which the master had neglected to communicate, although the information might have been given in time to have governed the terms of the insurance. He had in fact written to his owners after the loss had happened, and they were in possession of the letter when they effected the policy: but it contained no mention of the loss, nor does it appear from the report that this letter was shewn to the underwriters, or that any representation was made to them founded upon its contents. In respect to them the case was simply that of the concealment of a loss, which was unknown to the assured, but which their agent was *bound to communicate*, and *might have communicated*—and it was so treated by all the judges. It was for the recovery of the partial loss that the action was brought, and it was the opinion of the Court, that the concealment of the master, although not being fraudulent, it did not operate to avoid the policy, yet exonerated the underwriters from the payment of the

(1) 1 T. R. 12. (2) 1 M. & S. 35.

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loss. Lord Ellenborough remarked that unless this rule was adopted the master would be instructed to remain silent in all similar cases, and then the underwriters would incur the certainty of being rendered liable for all antecedent average losses that they could not prove to have been known to the assured.

These decisions establish that the knowledge of an agent not authorized to insure may be imputed to his principal, so that his silence shall have the effect of a concealment avoiding the policy and exonerating the underwriters from the loss. They seem to me à fortiori cases to the present. The master had nothing to do with the insurance. His knowledge was, however, imputed to the plaintiffs, although he did not communicate to them what he knew.

Proudfoot v. *Montefiore* (1) is a comparatively recent case. The plaintiff, in Manchester, employed an agent at Smyrna, who purchased and shipped for him there a cargo of madder, of which he advised him on the 12th of January, and forwarded the shipping documents on the 19th. The ship sailed on the 23rd of that month, and went ashore the same day, whereby there was a total loss of the cargo. Next day the agent had intelligence of the loss, and might have telegraphed the casualty to his principal immediately, but refrained on purpose that his principal might insure the cargo. On the 26th, which was the earliest post day for England, he announced the loss to his principal by letter. Meanwhile, before the arrival of that letter, but after the loss had been posted in Lloyd's List, the principal effected an insurance on the cargo. It was held the policy was void on the ground of concealment of material facts *known to the agent, and therefore known to the principal.* All the cases, both English and American, were reviewed, and the judgment of the Court, consisting of Cockburn, C.J., Blackburn and Shee, JJ., was delivered by Cockburn, C.J., and unless that judgment is overruled it is clear that an assured cannot recover on a policy when he has been designedly kept in ignorance of material facts by somebody whose duty it was to communicate them. The Chief Justice in his judgment says (p. 519): "There was no fraud or undue concealment by the plaintiff" (the assured) "of a material fact

(1) Law Rep. 2 Q. B. 511.

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within his personal knowledge. On the other hand it is clear that the fact of the loss of the vessel might have been communicated to him by Rees by means of the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and looking to the now general use of the electric telegraph, in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employers by this speedier means of communication." Further on the Chief Justice says (p. 521): "That if an agent, whose duty it is, in the *ordinary course of business*, to communicate information to his principal as to the state of a ship and cargo, *omits* to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation." Then come these very important words: "The insurer is entitled to assume, as the *basis* of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the *ordinary course of business ought* to have, knowledge, and that the latter will take the necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with when by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it." The case we are now considering is a much stronger case than *Proudfoot* v. *Montefiore* (1), for here the agent, who designedly withheld material information, was at *the time* employed by the assured to effect an insurance.

The case of *Stribley* v. *Imperial Marine Insurance Co.* (2) does not appear to me to carry the matter beyond the cases already cited.

(1) Law Rep. 2 Q. B. 511. (2) 1 Q. B. D. 507.

The authorities, therefore, support the conclusion at which I have arrived.

I fail, however, to see why in principle there should be any distinction between the case where the insurance is effected by the agent who obtained the information, and when it is effected by another agent employed about the insurance.

In both cases the assured, by a suppression of what ought to have been communicated to him, obtains an insurance which he would not otherwise have got. The underwriters are as much misled in the one case as the other. In both cases there is misconduct on the part of the agent of the assured; in both cases the underwriters are free from blame. It seems to me unjust and against public policy that a person, through whose agent's fault the mischief has happened, should profit to the detriment of those who are in no way in fault.

On the ground of the implied contract between the parties, I am of opinion, too, that the defendant is entitled to succeed. The concealment by an agent who is bound to give the intelligence violates the undertaking on which the contract is founded, in the same way as a similar concealment by a principal. The underwriter has a right to believe, when he accepts the risk, that he is placed in possession of all the information which the assured himself has, or which it was the *duty of* any agent of his to communicate. The underwriter does not intend to insure risks concealed by some agent employed to obtain an insurance, who ought to have communicated them to his principal, any more than he does risks concealed by the agent actually effecting the insurance, or concealed by the principal himself. It is admitted that freedom from misrepresentation or concealment is a condition precedent to the right of the assured to insist on the performance of the contract, so that on a failure of the performance of the condition the assured cannot enforce the contract; but it is insisted also, that if the misrepresentation or concealment is by an agent, it does not vitiate the policy where the principal is innocent, unless the agent be the agent employed to effect the insurance. I cannot accede to that. I think there must be a freedom from misrepresentation or concealment, not only so far as the agent by or through whom the policy is effected is con-

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cerned, but in respect of any agent employed by the assured to obtain the policy, whose duty it was to communicate material facts to his principal.

Any more limited construction, to my mind, would be against public policy, against principle, contrary to authority, and would tend to encourage fraud and collusion in transactions where uberrima fides is essential.

The appeal, in my opinion, must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendant: *Waltons, Bubb, & Johnson.*

J. E. H.

July 2.

PARKER, APPELLANT; INGE, RESPONDENT.

Local Government Acts—Nuisance — Abatement—Owner—Default—Nuisance arising from defective Construction of Structural Convenience—Jurisdiction of Justices to order Owner to abate Nuisance where Premises leased for Years—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 95, 96.

A local authority served the owner of premises with a notice, under s. 94 of the Public Health Act, 1875, requiring him within seven days to abate a nuisance arising from the defective construction of a structural convenience, and for that purpose to execute certain specified works. Having failed to comply with the notice, the owner was summoned under s. 95 before a court of summary jurisdiction, and on the hearing it was proved that the premises in question were occupied by a tenant to the owner under a lease for twenty-one years containing the usual covenants:—

Held, that the owner, even although he could not enter upon the premises and execute the works without the tenant's permission, had "made default" in complying with the requisitions of the notice within the meaning of s. 95, and therefore that the justices had jurisdiction to make an order, under s. 96, requiring him to abate the nuisance.

CASE stated under the Summary Jurisdiction Act, 1879.

The respondent was summoned before three justices of the borough of Birmingham upon a complaint preferred by the appellant, who was inspector of nuisances for the borough, charging that a nuisance existed in a house and premises belonging to the respondent arising from the defective construction of

a water-closet and sink drains, and that the nuisance was caused by the act or default of the respondent.

The appellant, on the hearing of the complaint, asked the justices to make an order under s. 96 of the Public Health Act, 1875, requiring the respondent to abate the nuisance, and for that purpose to execute certain works specified in a notice which had been duly served upon the respondent by the appellant under s. 94 of the Public Health Act, 1875.

The justices dismissed the complaint, and stated a case, in which the following material facts were set forth:—

The house and premises in question, 65, Bull Street, Birmingham, were occupied by A. Loader as assignee of a lease dated the 17th of November, 1875, whereby the house and premises in question were demised by the respondent to one Reece for a term of twenty-one years from the 25th of March, 1876, at the yearly rent of 195*l*. The lease contained the usual covenants by the lessee to pay all rates, taxes, and outgoings whatsoever (except landlord's property tax); to empty and clean all gutters, sinks, and privies as often as there should be occasion; to keep and yield up at the expiration of the term the demised premises in good and tenantable repair, and to allow the lessor, his heirs or assigns, twice or oftener in every year during the term to enter upon the demised premises, "and there to view, search, and see the state and condition thereof, and of all decays and wants of reparation then and there found to give and leave notice in writing at or upon the demised premises to and for the said T. Reece, his executors, administrators, or assigns, to repair and amend the same within the space of three calendar months thence next ensuing, within which time he and they shall and will repair and amend the same accordingly." The lease also contained the usual covenant by the lessor for quiet enjoyment.

A. Loader became assignee of the lease from Reece prior to January, 1886, and the rent of 195*l*. was thenceforth paid by Loader to the respondent, and received by him on his own account.

On or about the 27th of January, 1886, the mayor, aldermen, and burgesses of the borough of Birmingham, as the urban sani-

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tary authority of the district, served a notice on the respondent, under s. 94 of the Public Health Act, 1875, requiring him to abate the nuisance within seven days from the service of the notice, and for that purpose to execute certain works specified therein. The justices found that the house and premises in question were at the time of the service of that notice and up to the hearing of the summons in such a state as to be injurious to health and unfit for human habitation, and that the nuisance arose "from the defective construction of a structural convenience, to wit, the water-closet, and of the pipes leading therefrom and to the sink drains."

The justices also found that the respondent had not complied with the requisitions of the notice, and that the works required by the appellant were necessary and proper for the abatement of the nuisance.

A local Act, 46 & 47 Vict. c. lxx., s. 13, provides that a notice given by the mayor, aldermen, and burgesses of the borough of Birmingham under s. 94 of the Public Health Act, 1875, requiring any person to abate a nuisance, may prescribe the description of the work required to be done, or of the materials to be used, or of the acts required to be done, and anything so prescribed shall be deemed to be a requisition of the notice within the meaning of the Public Health Act, 1875.

The question for the opinion of the Court was whether, on the facts stated, the respondent was liable to be called upon to abate the nuisance by the execution of the works specified in the notice.

If the Court should be of opinion that the respondent was not so liable, then the order of justices was to stand; but if the Court should be of opinion that the respondent was liable, then the case was to be remitted to the justices with the opinion of the Court thereon.

A. Charles, Q.C. (*H. Sutton* with him), for the appellant. The respondent is owner of the premises upon which the nuisance is alleged to exist, and the case finds that the nuisance arises from the defective construction of a structural convenience. Sect. 94

of the Public Health Act, 1875 (1), therefore directly applies, and notice to abate the nuisance was properly served upon the respondent by the appellant under s. 95. When the appellant was summoned before the court of summary jurisdiction for non-compliance with the terms of that notice the justices ought to have acted under s. 96 by making an order to abate the nuisance.

(1) Sect. 94: "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided—

"First, That where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner:

"Secondly, That where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order."

Sect. 95: "If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice, is, in the opinion of the local authority, likely to recur on the same premises, the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction."

Sect. 96: "If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance, within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance.

"The court may by their order impose a penalty not exceeding five pounds on the person on whom the order is made, and shall also give directions as to the payment of all costs incurred up to the time of the hearing or making the order for abatement or prohibition of the nuisance."

Sect. 98: "Any person not obeying an order to comply with the requisitions of the local authority or otherwise to abate the nuisance, shall, if he fails to satisfy the court that he has used all due diligence to carry out such order, be liable to a penalty not exceeding ten shillings per day during his default."

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The respondent "made default" within the meaning of s. 95 by not complying with the requisitions of the notice.

He referred to *Cook* v. *Montagu*. (1)

Jelf, Q.C. (*W. R. Smith*, and *A. Lyttelton* with him), for the respondent. The justices had no jurisdiction to make an order on the respondent under s. 96. In order to found the jurisdiction there must be a "default" in the sense that some person who had the power to abate the nuisance has failed to do so. The statute does not assume that an owner of premises may, without the tenant's authority, in all cases enter and do the work required by the notice. The legislature probably intended to deal with cases of short tenancies in which the owner could enter upon the premises. At any rate this case has not been included in the operation of the statute. Sect. 96 gives the justices power to impose a penalty, and should be strictly construed.

[CAVE, J., the penalty is only discretionary.]

In *Cook* v. *Montagu* (1), Blackburn, J., expressly guarded himself against deciding the point in question here. *Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (2) is a strong authority in favour of the contention for the respondent, and *Reg.* v. *Trimble* (3) followed the decision in that case.

A. Charles, Q.C., was not heard in reply.

POLLOCK, B. The question asked in this case is whether the respondent is liable to be called upon to abate the nuisance by the execution of the works specified in the notice. In my judgment the respondent is so liable, and the case must therefore be remitted to the justices. It was argued for the respondent that the provisions of the Public Health Act, 1875, did not apply to a case like this, where the owner, upon whom the notice to abate the nuisance has been served, has not the immediate possession of the premises, having let them to another person under such circumstances that, except upon some special ground specified in the lease, the owner cannot himself enter upon the premises. I am of opinion that upon a reasonable construction of the statute proceedings were properly taken against the respondent as owner

(1) Law Rep. 7 Q. B. 418. (2) 1 Ex. D. 344.
(3) 36 L. T. Rep. 508.

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in the first instance, and that the magistrates had jurisdiction to make the order that he should abate the nuisance. The proviso to s. 94 of the Public Health Act, 1875, has two distinct branches—one where the nuisance arises from the want or defect in construction of any structural convenience, in which case the notice to abate must be served on the owner, and the other where the person causing the nuisance cannot be found, and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner, in which case the local authority may themselves abate the nuisance without further order. Then comes s. 95, upon which the contention for the respondent was founded. By that section if the person on whom the notice to abate has been served makes default in complying with any of the requisitions thereof within the time specified therein, the local authority shall cause a complaint to be made before a justice, who shall thereupon issue a summons requiring the person in default to appear before a court of summary jurisdiction. Here the facts proved before the justices shewed clearly that considerable structural alterations would be necessary in order to abate the nuisance, because the justices find that "such nuisance arises from the defective construction of a structural convenience—to wit, the water-closet, and of the pipes leading therefrom to the sink drains." It is said that the respondent did not "make default" in complying with the notice to abate, because he could not enter upon the premises to execute the works required. I do not say that there might not be cases in which that argument would be good, but it is obvious that they are very seldom likely to arise. It is not probable that the tenant in the great majority of instances would object to his landlord coming upon the premises to abate a nuisance which was injurious to the health of the persons living there. If the tenant does object, s. 98 applies, and no liability to a penalty occurs until a default is found, and the person in default "fails to satisfy the court that he has used all due diligence to carry out" the order to abate the nuisance. One must, I think, give a reasonable interpretation to the statute. It is fair to suppose that if an owner in default shewed that he had done his best to enter upon the premises, but that his tenant would not let him

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do so, the justices would be of opinion that the owner had not failed to satisfy the court that he had used all due diligence to carry out their order, and the local authority would then themselves proceed to execute the necessary works under the second branch of the proviso to s. 94. Bearing in mind the difficulty, in framing such an Act as this, of specifying and providing for all the exact legal rights which may come in question, I am of opinion that the most reasonable supposition is that the legislature intended that the justices should make the order upon the owner in the first instance to abate the nuisance. I therefore think that the case must be remitted to the justices with this expression of the Court's opinion.

CAVE, J. I am of the same opinion. The language of the Act seems quite clear. The local authority, when they get information of the existence of a nuisance, are to serve a notice to abate the same on the person by whose act, default, or sufferance it arises or continues, and if such a person cannot be found, then on the owner or occupier of the premises. Where the nuisance is of a temporary nature, as where dust or refuse is deposited on premises, the notice should be served on the occupier or person by whose act, default, or sufferance the nuisance exists or continues. But where, as in the present case, it arises from the defective construction of any structural convenience, the notice must be served on the owner. In that case it would obviously be extremely hard to summon the unfortunate occupier, who possibly could not abate the nuisance, or could only do so by incurring greater expense than he ought as a tenant to be called upon to incur. There is no provision in s. 94 for serving notice upon any one but the owner, where the nuisance arises from the defective construction of a structural convenience, so that, if he cannot be served, there is no one who can be required to abate the nuisance. That is a strong argument that the legislature intended the owner to be called upon in the first instance to abate the nuisance. If the owner makes default in complying with the terms of the notice, the local authority may go before a justice, who shall summon him to appear before a court of summary jurisdiction, and that court shall make an order requiring

him to comply with the terms of the notice, or otherwise to abate the nuisance. Further, by s. 98, if the owner does not obey the justices' order he shall, "if he fails to satisfy the court that he has used all due diligence to carry out such order," be liable to a penalty. If, as is suggested, the justices have no jurisdiction where the owner is not also the occupier, there is then no person who can be called upon to abate the nuisance, and that result appears so unreasonable that I should not, unless compelled by the terms of the Act, adopt the construction which would produce it. In *Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (1) the Court held that the appellants could not be ordered to abate a nuisance caused by ashes and refuse having been deposited in a field, because the field was not in their occupation. That decision is supposed to be founded upon the rule that the Courts will not order a man to do that which he cannot do, because to do so would be absurd. The judgments are very shortly reported, and I confess I cannot understand the case. But the present case is very different. Here there are the direct words of the statute that where the nuisance arises from the defective construction of a structural convenience, the local authority "shall" serve notice to abate on the owner, and the court of summary jurisdiction "shall," if default be made in complying with the notice, make an order upon the owner. The legislature enacted those provisions knowing that in the majority of cases the occupier would not object to the owner entering upon the premises for the purpose of abating a nuisance which was likely to prejudice the health and comfort of those who lived there. When the occupier does object, the owner may possibly be able to satisfy the court of summary jurisdiction that he has used all due diligence under s. 98. I am of opinion that the case must be remitted to the justices.

Case remitted accordingly.

Solicitors for appellant: *Sharpe, Parkers, & Co., for E. O. Smith, Birmingham.*

Solicitor for respondent: *Spencer Whitehead, for Milward & Co., Birmingham.*

(1) 1 Ex. D. 344.

W. A.

Considered. VITKOVICE, ETC. *v.* KORNER [1951] A. C. 869

Referred to. KORNER *v.* WITKOWITZER [1950] 2 K. B. 128

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Aug. 2, 11.

[IN THE COURT OF APPEAL.]

THOMAS *v.* THE DUCHESS DOWAGER OF HAMILTON.

Practice—Writ of Summons—Service of Writ out of the Jurisdiction—Order XI., r. 1 (e)—Order limiting Plaintiff's Right to recover at the Trial.

An order having been obtained under Order XI., r. 1 (*e*), for service of notice of a writ out of the jurisdiction in an action for the price of goods supplied, and service having been effected accordingly, the defendant applied to a judge at chambers to rescind the order and set aside the subsequent proceedings under it. The judge, being doubtful on the affidavits used whether there had been any breach of the contract within the jurisdiction, refused the application, but ordered that the plaintiff's claim should be limited to the recovery of the price of goods in respect of which it might appear at the trial that the writ could have been properly served out of the jurisdiction :—

Held (reversing the judgment of the Queen's Bench Division), that the order of the judge at chambers was rightly made.

APPEAL from the judgment of the Queen's Bench Division setting aside an order of Day, J., at chambers.

The facts were as follows: An order had been obtained from Field, J., at chambers for service out of the jurisdiction of notice of the writ (which was a specially indorsed writ claiming a balance in respect of the price of goods supplied) under Order XI., rule 1 (*e*), which provides for service out of the jurisdiction in the case of an action for breach within the jurisdiction of any contract wherever made which, according to the terms thereof, ought to be performed within the jurisdiction. Service having been effected accordingly, the defendant applied to Day, J., at chambers on affidavits to rescind or vary the order of Field, J., and to set aside the subsequent proceedings thereon. It appeared from the affidavits that certain jewelry had been supplied by the plaintiff to the defendant, who was a foreigner residing abroad, and the matter in dispute upon such affidavits was whether the price of such jewelry was, by the terms of the sale, made payable in this country or abroad. The learned judge refused to rescind or vary the order of Field, J., for service out of the jurisdiction, or to set aside the service, but ordered that the plaintiff's claim in the action should be limited to the recovery of the price of

goods in respect of which it might appear at the trial that a writ could have been properly served out of the jurisdiction.

Against this order the plaintiff appealed.

Edward Pollock, for the plaintiff. The learned judge ought not to have imposed this limitation on the plaintiff's claim. It is submitted that upon the affidavits it clearly appeared that the moneys sued for were payable within the jurisdiction. If the judge was not satisfied on the affidavits that the action was for breach of contract within the jurisdiction, he might have rescinded the order for service out of the jurisdiction. He refused, however, to do that, and the defendant has not appealed against his order. The order for service out of the jurisdiction therefore stands good; and it is contended that, that being so, it is not right that this limitation should be imposed on the plaintiff. It is often a nice question where a contract is to be performed, and the effect of this order will be that the plaintiff must prepare his evidence of all the causes of action included in his claim, and then, if on the trial it should turn out that the price of all or any of the goods was payable abroad, though it is clear that the plaintiff's claim for the price of such goods is well founded, he must fail with respect to such goods, and the expense of preparing for trial will be thrown away. The question which the learned judge has postponed till the trial is a preliminary question which ought properly to be determined at the outset of the litigation. If the judge is not satisfied that the action is for a breach of a contract within the jurisdiction, the service out of the jurisdiction ought not to stand, but, if the service out of the jurisdiction stands good, then the plaintiff ought not at the trial to be subjected to this limitation. In *Preston* v. *Lamont* (1) it was held that the question whether the subject matter of an action was such that service out of the jurisdiction ought to be allowed could not be raised by the statement of defence. It follows that it cannot properly be made part of the issue at the trial.

Bremner, for the defendant. The limitation imposed by the learned judge can work no injustice, for under it the plaintiff will succeed at the trial in respect of any matter for which he ought to

(1) 1 Ex. D. 361.

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be allowed to proceed in England. The practice before the Judicature Act was to impose this limitation on the plaintiff's claim where, as here, there was a direct conflict on the affidavits as to the facts on which the right to serve the writ out of the jurisdiction depended. How otherwise can the matter conveniently be dealt with? It would be necessary to try the action in order to determine the preliminary question whether there ought to be service out of the jurisdiction.

[FIELD, J. It seems to me that, according to the rules, the duty of determining that question is imposed on us. What authority have we to postpone this question for determination by a Court that has no jurisdiction to try it?]

The course pursued is substantially the same as that pursued in *Diamond* v. *Sutton*. (1)

[FIELD, J. The circumstances there were peculiar. In that case the Court doubted the plaintiff's bona fides.]

He also cited *Fowler* v. *Barstow*. (2)

E. Pollock was not called on to reply.

FIELD, J. Upon the affidavits before me when I made the order for service out of the jurisdiction I was satisfied that the breach of contract (if any) was within the jurisdiction as required by the rule, and consequently I made the order. The defendant subsequently applied on affidavit to set aside that order and the service of the notice. It was competent to the judge at chambers to set aside the order and service if not satisfied that the breach of contract arose within the jurisdiction. He did not, however, take that course, but not being altogether satisfied as to whether the breach of contract arose within the jurisdiction or not he imposed on the plaintiff's claim the following limitation, viz., that it should be limited to matters as to which it might appear at the trial that a writ could have been properly served out of the jurisdiction. It is in respect of that limitation that the plaintiff complains of the order. It was alleged by the defendant's counsel that before the Judicature Act it was the regular practice to impose that limitation in such cases, but he only cited one case as an authority for an order in this form, and that case does not

(1) Law Rep. 1 Ex. 130. (2) 20 Ch. D. 240.

appear to me to be in point, for there the circumstances were peculiar and a want of bona fides was imputed to the plaintiff. It does not seem to me that in general it can be right as a matter of principle to impose such a limitation. It is to postpone until the trial a preliminary question of procedure which ought properly to be determined at the outset of the litigation. I am of opinion therefore that the appeal should be allowed.

BUTT, J. I am of the same opinion. The ground on which the order for service out of the jurisdiction was made in this case is that the breach of contract arose within the jurisdiction. Unless it appeared that such was the case, the order for such service is altogether wrong and ought to have been set aside, but if it did so appear I fail to see what power there is to impose this limitation on the plaintiff's claim. The defendant might have appealed against the refusal of the judge at chambers to set aside the service out of the jurisdiction. This, however, he has not done: and indeed, upon reading the affidavits on both sides, it seems clear to me that the order for service out of the jurisdiction was right, and that it was sufficiently made out that the breach of contract arose within the jurisdiction. That being so I cannot see how it could be right to impose this limitation.

The defendant appealed.

Aug. 11. *Finlay, Q.C.* (*Bremner* with him), for the defendant, cited *Diamond* v. *Sutton* (1) and *Fowler* v. *Barstow*. (2)

Lumley Smith, Q.C., and *E. Pollock*, for the plaintiff, cited *Preston* v. *Lamont*. (3)

LORD ESHER, M.R. In such a case as this a judge at chambers is not bound to make the order for service of notice of the writ of summons out of the jurisdiction. He has a discretion whether, under all the circumstances, he will make it or not. It would appear that some judges, when asked to set aside an order for service out of the jurisdiction, and being in doubt whether on the affidavits there has been a breach of the contract within the jurisdiction, have made terms with the plaintiff, and imposed a condition upon the exercise of their discretion in his favour by refusing to set aside the order for service out of the jurisdiction

(1) Law Rep. 1 Ex. 130. (2) 20 Ch. D. 240. (3) 1 Ex. D. 361.

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Lord Esher, M.R.

upon his undertaking to confine his claim at the trial to breaches of contract within the jurisdiction. Where the judge is clear on the affidavits that there was no breach of the contract within the jurisdiction he has allowed service out of the jurisdiction. If he is clear to the contrary he has rescinded the order for service out of the jurisdiction. Orders similar to that in question here, imposing terms limiting the plaintiff's right to recover at the trial, have only been made where the judge is left in doubt. Field, J., has taken the strict view, upon which he appears to have always acted in chambers himself, that such an order is an inconvenient one, and should never be made. His judgment seems to go the length of saying that even when the judge is left in doubt he ought not to impose such a condition. Butt, J., thought that the affidavits shewed clearly that there was a breach of contract within the jurisdiction. I do not agree with that view. I cannot say that the affidavits shew clearly to my mind that there was any breach of the contract in England. It may turn out that there was, but the affidavits leave the matter in great doubt, and when that is the case I am of opinion that a judge does not go beyond his discretion when he imposes such conditions as have been imposed here.

I think that Day, J., was right in entertaining doubt whether on the affidavits any breach of the contract was shewn to have taken place in England, and having that doubt I think that it was competent to him to make the order he did make, and that it should be restored.

BOWEN, L.J. I am of the same opinion. As to the affidavits, I think Day, J., was justified in entertaining great doubt whether any breach of the contract was shewn to have occurred in England. After reading the affidavits and hearing the arguments, I entertain the same doubt myself. The question we have to decide is whether or not under the circumstances Day, J., was acting within his discretion in making the order. If he was not, this Court has power to review his order. If he was, we cannot interfere. Service of notice of writ out of the jurisdiction cannot be obtained without the process of the Court, and whether service out of the jurisdiction shall be allowed or not is now a matter for the discretion of the judge in the same way as it was

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under the old practice. There is no absolute right strictissimi juris, when there has been a breach of the contract within the jurisdiction, to have service out of the jurisdiction. When the matter comes before the judge at chambers it is for him to consider whether there is a real danger that the plaintiff may be unjustly and unnecessarily bringing the defendant into the jurisdiction of the English Courts, whether the application is made bonâ fide, and whether the action appears to be based upon any breach of the contract within the jurisdiction. In exercising his discretion what more natural and simple than that the judge should impose an undertaking upon the plaintiff that he will not abuse the process of the Court? Nothing more than that has been done here, and I believe that what has been done is in accordance with the old practice; at all events it is a very natural and simple mode of exercising the discretion. I am of opinion that the Court below were not entitled to say that any narrower view must prevail of the lines upon which the discretion ought to be exercised by the judge in chambers. In *Diamond* v. *Sutton* (1) the Court followed the same lines, and imposed the same undertaking as Day, J., imposed here. In *Fowler* v. *Barstow* (2) the late Master of the Rolls, obiter dicendo no doubt, refers to the same practice with approval. *Preston* v. *Lamont* (3), cited for the plaintiff, has no application. The decision there only was that the point could not be raised by plea. I think there was a right exercise of discretion by the judge in chambers in this case, and that his order was rightly made.

FRY, L.J. I am of the same opinion. I think Day, J., was perfectly justified in making the order, and that it ought not to be set aside in this Court. I think he rightly exercised his discretion.

Appeal allowed.

Solicitors for plaintiff: *Goldberg & Langdon.*
Solicitors for defendant: *John Vernon & Co.*

(1) Law Rep. 1 Ex. 130. (2) 20 Ch. D. 240.
(3) 1 Ex. D. 361.

E. L.
W. A.

1886
June 9;
Aug. 12.

THE QUEEN *v.* THE JUSTICES OF THE CENTRAL CRIMINAL COURT.

Criminal Law—Property obtained by False Pretences—Pledge of, to Innocent Party—Sale of by him—Conviction of Fraudulent Pledgor—Power to order Restitution of Proceeds of Sale—24 & 25 Vict. c. 96, ss. 1, 100.

Under 24 & 25 Vict. c. 96, s. 100—which enacts that if any person guilty, inter alia, of obtaining any property by false pretences is convicted thereof, in such case the property shall be restored to the owner or his representative, and in every such case the Court before whom any such person shall be tried, shall have power to order the restitution thereof in a summary manner—the Court has jurisdiction to entertain an application for the restitution of the proceeds of the property as well as of the property itself.

Such an application ought only to be granted if the proceeds are in the hands of the convict or of an agent who holds them for him.

RULE calling on the prosecutor in a case of "*The Queen* against *Foisard*" to shew cause why a writ of certiorari should not issue to remove into the Queen's Bench Division an order made at the Central Criminal Court ordering Corrie, Hanson & Co. to pay to the prosecutor £108, the proceeds of the sale of certain flax, in order that it might be quashed as having been made without jurisdiction.

It appeared that Foisard having obtained some flax by false pretences from one De Greve took it to Hull, where he commissioned Corrie, Hanson & Co. to sell it on commission. They advanced 72*l.* on it to him, and afterwards sold it for 115*l.* Foisard was convicted at the Central Criminal Court on the prosecution of De Greve for obtaining the flax by false pretences, and an order was there made directing Corrie, Hanson & Co. to deliver to De Greve 108*l.*, being the proceeds, less expenses, of the sale of the flax.

Abrahams, shewed cause. The applicant suggests that the order for restitution made at the Central Criminal Court is bad on two grounds, first, because the property the proceeds of which have been ordered to be restored is not the property of the prosecutor; and, secondly, because it is said that a Court can, under 24 & 25 Vict. c. 96, s. 100, only order the restitution of the goods themselves and not of the proceeds of the sale of those goods.

As to the first point, the judge had jurisdiction to make the order, and this Court will not inquire into the facts to see whether he has exercised his jurisdiction in the right way. If it would, then *Reg.* v. *Stancliffe* (1) decides that the fact that goods have been parted with to a pawnee will not prevent the original owner from obtaining an order for their restitution, and *Moyce* v. *Newington* (2), which was a decision in a case of a bonâ fide sale, does not apply to the case of a pledge: *Higgons* v. *Burton.* (3)

Secondly, the proceeds of goods are within the statute equally with the goods themselves.

[He was stopped.]

E. Wilberforce, in support of the rule. The order made at the Central Criminal Court is bad on the face of it, for it does not shew that at the time of the conviction there were any proceeds in the hands of the person against whom the order was made. The judge has, under 24 & 25 Vict. c. 96, s. 100, only power to make an order if, when the order is made, the property is in the hands of the person against whom it is made, he has to inquire whether certain facts exist, and unless those facts exist, there is no jurisdiction to make an order, he cannot give himself jurisdiction by erroneously finding certain facts. Even if there was jurisdiction to make an order against the property, still the proceeds of the property cannot be the subject of such an order, for the part of the judgment in *Lindsay* v. *Cundy* (4) which lays this down was not reversed on appeal, and *Moyce* v. *Newington* (2) is an authority to the same effect on this point.

[LORD COLERIDGE, C.J., referred to *Harris' Case* (5) and *Hanberrie's Case*, cited in *Holiday* v. *Hicks* (6).]

Abrahams, in reply. The dicta in *Lindsay* v. *Cundy* (4) no doubt support the argument of the applicant; but there was in that case a sub-sale, which is not the case here. The proceeds of goods are for this purpose the same as the goods themselves, as in *New Zealand and Australian Land Company* v. *Watson* (7), where the goods and the produce of the goods were held to be

(1) 11 Cox, Crim. C. 318.
(2) 4 Q. B. D. 32.
(3) 26 L. J. (Ex.) 342.
(4) 1 Q. B. D. 348.
(5) Noy, 128.
(6) Cro. Eliz. 661.
(7) 7 Q. B. D. 374.

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the same when the question was one of following goods in the hands of an agent, and this view of the law was affirmed in *Kaltenbach* v. *Lewis*. (1) The interpretation clause in 24 & 25 Vict. c. 96, s. 1, is very wide in its terms, and enacts that the term "property" shall include not only the property itself but also "any property into or for which the same may have been converted."

Cur. adv. vult.

Aug. 12. The judgment of the Court (Lord Coleridge, C.J., and Cave, J.) was read by

LORD COLERIDGE, C.J. In this case Mr. Wilberforce obtained a rule calling on the justices of the Central Criminal Court to shew cause why an order of theirs made on the 8th of March last should not be brought up and quashed for want of jurisdiction.

The order in question recited that on the 8th of February, 1886, one Allen Foisard, otherwise Jules Maloche, was convicted of unlawfully obtaining on the 16th of December, 1885, by false pretences, from one François de Greve eighteen bales of flax, and that it had been made to appear to the Court that the said bales were on the 1st of January, 1886, in the possession of Corrie, Hanson & Co., flax merchants, Hull, who in the said month of January sold the same for 108*l*., and ordered Corrie, Hanson & Co. to restore and deliver to Greve the said sum of 108*l*.

This order was made under the 24 & 25 Vict. c. 96, s. 100, which enacts that "if any person guilty of any such felony or misdemeanour as is mentioned in this Act in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the

(1) 10 App. Cas. 617.

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said property, or to order the restitution thereof in a summary manner." By s. 1 of the same Act it is enacted that "the term property shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party; but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

The first point taken was that this definition did not apply to the word "property" in s. 100, and consequently that the justices had no jurisdiction to order restitution of the proceeds of the flax. In support of this contention the case of *Lindsay* v. *Cundy* (1) was cited. That case, however, decided nothing as to the jurisdiction of the Central Criminal Court. What it did decide was that where goods have been obtained by false pretences, and sold to an innocent purchaser who has resold them before the conviction of the criminal, the interpretation clause does not so apply to s. 100 as to give the prosecutor a title to the produce of the goods in the hands of an innocent person who has bought and resold the goods before the conviction.

There are several cases, such as that of *Harris* (2) and *Hanberrie's Case*, cited in *Holiday* v. *Hicks* (3), and *Rex* v. *Powell* (4), which shew that under both the 21 Hen. 8, c. 11, and 7 & 8 Geo. 4, c. 29, s. 57, which are similar in terms to the 24 & 25 Vict. c. 96, s. 100, the Courts before which prisoners have been convicted of larceny have been in the habit of ordering restitution either of the goods stolen or of their produce, according to circumstances.

The second objection was that the order was wrong in point of law, but that is an objection which can only be taken by way of appeal, and not upon application for a certiorari, on the ground of excess of jurisdiction.

An application for the restitution of property stolen or ob-

(1) 1 Q. B. D. 348.
(2) Noy, 128.
(3) Cro. Eliz. 661.
(4) 7 C. & P. 640.

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tained by false pretences is rightly made to the Court before which the felon or misdemeanant is convicted; and, if the goods have been sold, an application may be made for the restitution of the proceeds, which, if they are in the hands of the criminal or of an agent who holds them for him, should be granted. If the person holding the proceeds does not hold them for the criminal, the application should not be granted; but the fact that the Court may have come to a wrong decision does not establish an excess of jurisdiction. It is a very common mistake to suppose that it does; but, where a Court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in point of law or of fact.

Before parting with the case it may be as well to observe that, although the conviction took place on the 8th of February, the order in question was not made till the 8th of March. No objection was taken to the order on this ground; and it is possible that the application may have been made on the 8th of February, and postponed to the 8th of March on the application of Messrs. Corrie, Hanson & Co. We only desire to guard against this case being cited as an authority for any other position than this, that the Court before which a conviction takes place within the terms of 24 & 25 Vict. c. 96, s. 100, has jurisdiction to entertain an application for the restitution of the proceeds of the goods, as well as of the goods themselves. Neither must it be supposed that we hold the order which was made in this case to have been rightly made in point of law.

The rule must be discharged with costs.

Rule discharged.

Solicitor for applicant: *Oldman.*

Solicitors for De Greve: *Michael Abrahams, Son, & Co.*

R. B. R.

[IN THE COURT OF APPEAL.]

1886
July 7, 8.

MILLAR *v.* TOULMIN.

Practice—Appeal—Application for New Trial—Power of Court of Appeal to give Judgment—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 4.

On an appeal from the order of a Divisional Court, upon an application for a new trial, the Court of Appeal has power, under Order LVIII., r. 4, if all the facts are before the Court, to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial.

ACTION by a commission agent to recover commission for having found a purchaser for property sold by the defendant.

At the trial before Lord Coleridge, C.J., the jury found a verdict for the defendant.

A new trial was ordered by Manisty and Hawkins, JJ., on the grounds of misdirection, and that the verdict was against the weight of evidence.

The defendant appealed.

Cock, Q.C., and *Beddall*, for the defendant. There was no misdirection. The verdict was not against the weight of evidence, and ought to be upheld.

[LORD ESHER, M.R. If we think otherwise, and if all the facts are before us, have we not power under Order LVIII., r. 4, to enter judgment for the plaintiff?]

No such power is given by the rule. It never was contemplated that the functions of the jury should be superseded in this way. The effect would be practically to abolish trial by jury. The most the Court can do is to order a new trial.

Murphy, Q.C., and *Cagney*, for the plaintiff. The verdict ought to have been the other way, and this Court has power now to enter judgment for the plaintiff. The inferences of fact which a Divisional Court can draw by virtue of Order XL., r. 10, must be "not inconsistent with the finding of the jury," but these words do not occur in Order LVIII., r. 4. The omission is significant, and shews that it was intended to give power to the Court of Appeal to draw any inferences of fact, whether consistent or inconsistent with the verdict.

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Hamilton v. *Johnson* (1) and *Williams* v. *Mercier* (2) were cited.

LORD ESHER, M.R. I am satisfied that the verdict is against the weight of evidence, and that the jury ought to have found for the plaintiff. It is clear therefore that the verdict must be set aside.

But then arises the question whether, if we are of opinion that we have all the facts before us, we are bound to send the case down for a new trial, or whether it is not our duty to spare the parties the expense of a new trial and enter judgment for the plaintiff. The answer to that question depends on the construction of the Rules of 1883. One of the objects of the Judicature Acts is to prevent multiplicity of trials, and there are two rules directed to that object. The first of these is Order XL., r. 10, which applies to Divisional Courts, and empowers the Court to "draw all inferences of fact, not inconsistent with the findings of the jury," and, if all necessary materials are before the Court, to enter judgment. The words giving power to draw inferences of fact are new, and were not in the former rule.

The other rule is Order LVIII., r. 4, which is a separate and distinct rule, applying only to the Court of Appeal. It gives powers of amendment and of receiving additional evidence, and then provides that "the Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." I think these words give power to give the judgment which ought to follow from the evidence produced at the trial. They differ from the words of Order XL., r. 10, in not limiting the inferences of fact which may be drawn to inferences not inconsistent with the findings of the jury. Under this rule very large powers are given to the Court of Appeal, including, in my opinion, the power, if all the necessary materials are before the Court, of giving that judgment which in the opinion of the Court ought to be the judgment between the parties, even though such judgment be inconsistent with the findings of the jury.

(1) 5 Q. B. D. 263.
(2) 9 Q. B. D. 337; affirmed in the House of Lords, 10 App. Cas. 1.

In the present case I am of opinion that we have all the facts before us, and that no further evidence could be given which could alter the result, and therefore instead of directing a new trial we ought to enter judgment for the plaintiff.

If there is any question as to amount, it can be settled by the master.

BOWEN, L.J. I am of the same opinion. I think that the verdict was against the weight of evidence, and must be set aside, and I think we have all the facts before us. I agree with the Master of the Rolls that under Order LVIII., r. 4, the Court of Appeal has power to relieve against all miscarriages of justice, and can direct judgment to be entered, if satisfied that no jury could properly come to a different conclusion.

FRY, L.J. I also think the verdict was against the weight of evidence.

The question then arises, what is our duty? Have we power, not only to set aside the verdict, but to enter judgment the other way? The difference between Order XL., r. 10, and Order LVIII., r. 4, is very great, and the latter rule, which applies to the Court of Appeal, gives larger powers than the former. The reason appears to be that the Court of Appeal has power to hear fresh evidence, and therefore they ought not to be bound by the finding of the jury in drawing inferences of fact.

Judgment for the plaintiff.

Solicitor for the plaintiff: *E. W. Beal.*

Solicitors for the defendant: *C. & S. Harrison & Co.*

P. B. H.

1886
Aug. 6.

AHRBECKER & SON *v.* FROST.

Practice—Costs—Claim on Contract and Counter-claim—Costs of Issues where the Plaintiff recovers less than 20l. and the Defendant recovers a larger Amount—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5.

In an action of contract the defendant counter-claimed. By the award of a special referee it was found that the plaintiffs were entitled on their claim to 13*l.* 12*s.* 6*d.*, and that the defendant was entitled on the counter-claim to 63*l.* 8*s.* 6*d.* :—

Held, that by reason of the provisions of the 5th section of the County Courts Act, 1867, the plaintiffs were not entitled to the costs of the issues found for them on the claim.

Lund v. *Campbell* (14 Q. B. D. 821) distinguished.

Application to set aside the judgment signed by the defendant in the action as irregular on the ground that the same was not signed in accordance with the award and findings of a special referee to whom the issues had been referred. The facts were as follows :—

The plaintiffs' claim in the action was for 56*l.* 1*s.* 4*d.* for the balance of the contract price of a steam-engine (after giving credit for payments on account), and for the price of certain extras, being work done and materials provided in connection with the contract for the supply of the engine. The statement of defence in effect denied that the defendant was indebted to the plaintiffs in any of the sums claimed, and counter-claimed damages for breach of the contract to supply the steam-engine, on the ground that the engine supplied was not according to the contract.

The issues in the action were ordered by a judge at chambers to be referred to a special referee, and by the order of reference it was provided that the costs of the cause, reference and award should follow the event, and that the successful party might sign judgment in accordance with the award. The referee awarded that the sum of 13*l.* 12*s.* 6*d.* only was due to the plaintiffs upon their claim, and that the sum of 63*l.* 6*s.* 8*d.* was due to the defendant as damages upon the counter-claim. The defendant thereupon signed judgment for 49*l.* 14*s.* 2*d.*, being the balance after deducting the 13*l.* 12*s.* 6*d.*, and for the costs of the cause, reference and award to be taxed.

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Channell, Q.C. and *Rose Innes*, for the plaintiffs, moved to set aside the judgment. The judgment was not signed in accordance with the effect of the award, for it gives all the costs to the defendant, whereas, according to the decision in *Lund* v. *Campbell* (1), the plaintiffs are entitled to the costs of the issues found in their favour on the claim. It will be urged that s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), deprives them of these costs, but that section is not applicable to the costs of issues found in favour of an unsuccessful plaintiff where the defendant succeeds in the action, and recovers a balance upon a counter-claim. It applies to deprive the plaintiff of costs where the plaintiff succeeds in the action, but does not recover more than 20*l.* The effect of *Lund* v. *Campbell* (1) is that, where there is a counter-claim, the whole must be treated for the purpose of costs as if it was one action, and the general costs of the action go to the party who on the balance is successful, but the unsuccessful party is entitled to the costs of the issues on which he has succeeded. Therefore, if the defendant succeeds and recovers a balance, the counter-claim is treated as the action, and he gets the general costs of the action, but subject to the plaintiff's right to deduct the costs of the issues on which the finding was for him.

Sutton, for the defendant, shewed cause. It is not disputed that, if this had merely been the case of a claim and there had been no counter-claim, the plaintiffs having succeeded in recovering only 13*l.* 12*s.* 6*d.*, could not have recovered any costs of these issues. How can they be in a better position because, there being a counter-claim, a larger sum has been recovered against them, and therefore they fail in the action altogether?

It is a fallacy to say that, where the defendant recovers a balance, the case is to be treated as if the counter-claim were the original action and the defendant the successful plaintiff in such action, and the unsuccessful plaintiff is to have the costs of issues found for him as if he were defendant in such action, because the plaintiff is in fact the attacking party, and having proceeded in the superior Court and recovered an amount less than 20*l.* is within the County Courts Act, 1867.

(1) 14 Q. B. D. 821.

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[He cited *Chatfield* v. *Sedgwick* (1), and *Baines* v. *Bromley*. (2)]

Channell, Q.C., in reply.

LORD COLERIDGE, C.J. I am of opinion that this application must be refused. As I understand the authorities down to the decision in *Lund* v. *Campbell* (3), the result of them certainly was to the effect that the right of the plaintiff to any costs in respect of his claim in such a case as this was subject to the provisions of the County Courts Act, 1867, which provides that the plaintiff who in an action of contract does not recover a sum exceeding 20*l.* shall have no costs. In this case the plaintiffs having brought their action, and the defendant having counter-claimed, the action was referred to a referee, who has found for the plaintiffs on the issue raised on the claim that they were entitled to the sum of 13*l.* 12*s.* 6*d.*, but the defendant has been substantially the victor in the action, the award being in his favour on the counter-claim for the sum of 63*l.* 6*s.* 8*d.* The question is whether the defendant being thus entitled to the general costs of the action, but the finding being in favour of the plaintiffs on the issues on the claim to the extent of 13*l.* 12*s.* 6*d.*, the judgment should give the costs of those issues to the plaintiffs. But for the fact that the sum found in favour of the plaintiffs does not exceed 20*l.*, it is clear that, according to the decision in *Lund* v. *Campbell* (3), the plaintiffs would be entitled to the costs of the issues on which they have succeeded. The question is, whether in this case the provision of the County Courts Act, 1867, applies and takes the case out of that decision, and whether an amount not exceeding 20*l.* having been recovered by the plaintiff upon his claim he is not entitled to the costs of the issues with regard to such amount. It does not seem to me that *Lund* v. *Campbell* (3) in any way interferes with the pre-existing authorities on that point. This point did not arise, and was not considered in that case. Apart from the authorities, if this case had to be considered now for the first time, I should say that the rational conclusion would be that a plaintiff, who would not be entitled to the costs of the action if the claim had stood alone

(1) 4 C. P. D. 459.

(2) 6 Q. B. D. 691.

(3) 14 Q. B. D. 821.

and there had been no counter-claim and he had succeeded to the extent of 13*l.* 12*s.* 6*d.* only, cannot be entitled to costs merely because, the defendant having counter-claimed against him and succeeded in recovering a larger sum, he has failed so far as the general result of the action is concerned. For these reasons I think that the application fails.

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DENMAN, J. I am of the same opinion.

Application refused.

Solicitor for plaintiffs: *G. W. Barnard.*
Solicitors for defendant: *Jackson & Prince.*

E. L.

[IN THE COURT OF APPEAL.]

May 26, 27.

THE WESTERN SUBURBAN AND NOTTING HILL PERMANENT BENEFIT BUILDING SOCIETY *v.* MARTIN.

Building Society—Rules—Dispute—Arbitration—Mortgagor and Mortgagee—Building Societies Act, 1884 (47 & 48 *Vict. c.* 41), *s.* 2.

By s. 2 of the Building Societies Act, 1884, unless otherwise expressly provided, the word "disputes" in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member in his capacity of member of the society, and shall not apply to any dispute between any such society and any member thereof as to the construction or effect of any mortgage deed, and shall not prevent any society, or any member thereof, from obtaining in the ordinary course of law any remedy in respect of any such mortgage, to which he or the society would otherwise be by law entitled.

The rules of a building society provided that any dispute arising between the society and any member thereof should be referred to arbitration:—

Held, in an action by the society to recover money due from a member under a covenant in a mortgage deed, that the words "any such mortgage" in the latter part of the section referred to any mortgage between the society and one of its members, and not only to mortgages as to the construction or effect of which there was a dispute, and, therefore, whether the dispute was one between the society and a member in his capacity of member of the society, or not, and whether it was a dispute as to the construction or effect of the mortgage deed or not, the rule did not apply, and the plaintiffs were entitled to proceed with their action.

Judgment of Grove and Stephen, JJ., reversed.

APPEAL by the plaintiffs from the judgment of Grove and Stephen, JJ. (reported ante, p. 66), affirming an order made

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by A. L. Smith, J., at chambers, by which he affirmed the order of a master staying proceedings in an action, and referring the matters in dispute therein to arbitration.

The plaintiffs were a benefit building society duly registered under the Building Societies Act 1874 (37 & 38 Vict. c. 42), and the defendant was a member of the society.

The action was brought to recover £34 12*s.* the amount of three instalments alleged to be due from the defendant to the plaintiffs under his covenant contained in a mortgage deed dated the 15th of February, 1881.

The plaintiffs were mortgagees and the defendant mortgagor under the mortgage deed, which was duly made in accordance with the rules of the society.

It was admitted that the only dispute between the parties to the action was whether or not the plaintiffs had given credit to the defendant for certain payments which he alleged he had made in respect of the principal moneys secured by the mortgage deed.

The order staying proceedings in the action and referring the matters in dispute to arbitration was made under one of the rules of the society, which provided that in case of any dispute arising between the society and any member thereof, or the legal representative of any member, it should be settled by reference to the registrar, or by arbitration, as might be agreed upon, but if the disputants could not agree among themselves, then by arbitration.

The words of s. 2 of the Building Societies Act 1884 (47 & 48 Vict. c. 41), on which the decision turned, are set out in the head-note.

Muir Mackenzie, for the plaintiffs. The case turns entirely on the construction of the Building Societies Act 1884 (47 & 48 Vict. c. 41), s. 2, for it must be conceded that if that Act had not been passed the action must have been referred, according to the view adopted by the majority of the House of Lords in *Municipal Permanent Investment Building Society* v. *Kent* (1) approving the decision in *Hack* v. *London Provident Building*

(1) 9 App. Cas. 260.

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Society. (1) The Act of 1884, however, was manifestly passed for the purpose of altering the law by bringing it into accordance with the view taken by Lord Selborne, who differed from the other members of the House of Lords in the first-mentioned case. The rule that disputes shall be referred has no application to the present case, for this is not a dispute "between the society and a member in his capacity of a member of the society," within the meaning of the statute: *Morrison* v. *Glover.* (2) It is a dispute as to the construction or effect of the mortgage deed.

The case comes within the words "shall not prevent any society . . . . from obtaining in the ordinary course of law any remedy in respect of any such mortgage . . . . to which . . . . the society would otherwise be by law entitled." The plaintiffs therefore, are entitled to proceed with their action.

Philbrick, Q.C., and *H. Tindal Atkinson*, for the defendant. This is a dispute between the society and the defendant in his capacity of a member of the society, for he could not be liable on the covenant except as a member. It is not a dispute "as to the construction or effect of any mortgage deed," for the sole question in dispute is whether credit has or has not been given for certain payments. The last words relied upon for the appellants have no application, for "any such mortgage" means any mortgage as to the construction or effect of which a dispute has arisen.

The case is governed by the rule, and the dispute must be referred: *Reeves* v. *White.* (3)

LORD HERSCHELL, L.C. This case turns, by the agreement of counsel on both sides, entirely upon the construction to be placed upon the 2nd section of the Building Societies Act, 1884. There can be no doubt, upon the authority of the case of *Municipal Permanent Investment Building Society* v. *Kent* (4), that but for the provisions of that section this action must have been stayed and the case referred to arbitration. The question is whether the alteration made in the law by that section applies to the present case, so that the society is entitled to proceed with its remedy at law without being restrained and compelled to go to arbitration under the rule. The section is not easy to construe;

(1) 23 Ch. D. 103.
(2) 4 Ex. 430.
(3) 17 Q. B. 995; 21 L. J. (Q.B.) 169.
(4) 9 App. Cas. 260.

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there are difficulties in any construction which may be put upon it. But I think it is necessary to look at the state of the law immediately before the Act was passed, to assist in guiding us to the construction of the section. In the case of *Municipal Permanent Investment Building Society* v. *Kent* (1) the question arose whether the society could sue a member at law for the purpose of enforcing remedies under a mortgage deed which he gave in respect of money advanced to him according to the rules of the society as a member, or whether it was limited to the remedy by arbitration. The majority of the House of Lords held that it was limited to the remedy by arbitration, that under the Building Societies Act 1874, all disputes were to be referred to arbitration as to which it was so provided by the rules, and that the rules of the society provided that disputes between the society and any member thereof, or the legal representative of any member, should be settled by arbitration.

The majority of the Law Lords held that the rule extended not merely to liability for subscriptions, fines, or otherwise, under the rules of the society, but to all liability of a member to the society arising out of transactions between the society and its members contemplated by the rules, and therefore applied to liability under a mortgage given to secure an advance which had been made in accordance with the rules. The Lord Chancellor, Lord Selborne, differed from the other learned Lords, and thought that a rule, even in those terms, did not extend to a dispute arising out of a mortgage deed. He pointed out the difficulties that might arise with regard to remedies such as foreclosure or redemption, which he thought could never have been intended to be left to arbitration in the manner provided by the Act, and he came to the conclusion that if he had to construe the arbitration clause without reference to statute or authority, he should think it related "to disputes under the rules between members (in that character) or their representatives in respect of their rights or liabilities as such, and the society, and not to questions arising out of covenants or special stipulations in deeds executed between members and the society, and embodying contracts collateral and additional to the social contract, though of a nature

(1) 9 App. Cas. 260.

contemplated and authorized by it; nor to any questions between the society as mortgagee and one of its members as mortgagor with reference to the legal consequences of, or rights and liabilities resulting from, the relation of mortgagor and mortgagee." (1) I may observe that the same redundancy which it is said would be found in s. 2 of the Act of 1884, according to the appellants' construction, is also to be found in the language which I have just quoted, because after saying that he should have thought that it did not relate to questions arising out of covenants between members and the society, and embodying contracts collateral and additional to the social contract, the mortgage security being one of such contracts or deeds, Lord Selborne says: "nor to any questions between the society as mortgagee, and one of its members as mortgagor, with reference to the legal consequences of, or rights and liabilities resulting from, the relation of mortgagor and mortgagee." In that state of the law the Act of 1884 was passed, which purports obviously, in some way or other, to limit the meaning of the word "disputes" in the Building Societies Acts, and in the rules of any society thereunder, and which was to extend to existing rules as well as to future rules, as is clearly shewn by the proviso at the end of the section. It appears to me, with great deference to the learned judges in the Court below, that they have not given sufficient weight to this fact. I cannot help thinking that the section was passed for the purpose of giving to the rules that meaning which Lord Selborne said that, apart from the question of authority, he should himself put upon them. I do not think it is necessary to decide this in the present case. My judgment will rest upon the construction to be put upon another part of the section, and I only desire to say that I am not prepared at present to accept the view that the proper construction of these words is that which has been put upon them by Stephen, J., in his judgment. The section continues thus: "and in the absence of such express provision shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed or any contract contained in any document other than the rules of the society."

(1) 9 App. Cas. at pp. 267, 268.

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Now these words undoubtedly prevent the application of the arbitration clause with reference to a particular class of disputes, namely, disputes "as to the construction or effect of any mortgage deed or any contract contained in any document other than the rules of the society." It may have been thought that the only disputes that were likely to arise under a mortgage deed or such a contract would result from its construction and effect. It is however obvious that this is not so, because in the present case there is no dispute as to the construction or effect of the mortgage deed, but the dispute is as to the payment which has been made under it; and I conceive many good reasons why it should be thought that that was a case fit to be left to arbitration, and perhaps more fit to be left to arbitration than to be left to the decision of the Court. But if the construction contended for by the respondent is correct, namely, that the words which follow are limited in the way he contends by the words which immediately precede them, it would not only leave cases of that description still referable to arbitration, and exclude the jurisdiction of the Courts, but it would also exclude the jurisdiction of the Courts in questions as to foreclosure or redemption. The next words are these: "and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled." I rest my judgment entirely upon the construction of these words, and I think the present case is within them. The society is seeking to obtain in the ordinary course of law a remedy in respect of a mortgage between the society and a member. Unless there is some reason for doing otherwise, we must put upon the words "any such mortgage" their ordinary grammatical construction. I cannot doubt that the ordinary grammatical construction which anyone would put upon them, unless he had reason for seeking another construction or thinking that another construction would better carry out the object of the legislature, would be that "any such mortgage" meant the mortgage to which reference has been made. I cannot think that it is a grammatical construction, or an admissible construction, unless we are driven

to it from the necessity of the case, to say that "such mortgage" means a mortgage as to the construction or effect of which there is a dispute, which is the view taken by the learned judges in the court below. That seems to be putting an unnatural meaning upon the words "any such mortgage" in order to carry out the presumed intention of the legislature, and, as it is thought, to reconcile the various limbs of the section.

If the ordinary grammatical construction would result in absurdity, or would violate the manifest intention of the legislature, it might be justifiable in such a case to adopt a somewhat forced construction such as is suggested. For my own part I think that ought to be done only in the last resort. The only reason given for adopting the forced construction is, that the earlier part of the section having provided that the word "disputes" shall not apply to a particular class of disputes arising under mortgages, this latter clause of the section is general in its terms, and provides, according to the construction I put upon it, that it shall not prevent the society or the member from using their legal remedy in respect of the mortgage, whatever the nature of the dispute which has arisen, and therefore the earlier clause is superfluous. I do not think there is sufficient reason for saying that the legislature did not intend that which follows from the grammatical construction of the words they have used in the latter part of the section. It may be that the former clause was put in the form in which it was put heedlessly, or unnecessarily; but this does not seem to me to be sufficient ground for departing from the natural plain construction of the latter part of the section; and I do not think we are justified in so doing. It is not as if the other construction would get rid of all difficulties, and place the whole law with reference to this matter on an intelligible and satisfactory basis free from difficulty. No construction is free from difficulty, and no construction carries out a clear, defined, well indicated policy on the part of the legislature. Under these circumstances there seems to be only one safe rule, and that is, to adhere to the words that have been used, inasmuch as the words used seem plainly to apply in their ordinary grammatical construction to this case. I feel compelled to come to the conclusion—whatever is the meaning of the first limb or the

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second limb of the sentence—that this third limb applies to the present case; and therefore the judgment of the Court below must be reversed. I will only add this—I do not think there is anything in the earlier part of the section which renders the construction which I have just put upon the latter part unreasonable or absurd or unnatural. Under these circumstances the judgment cannot stand, and the society is entitled to proceed with this action. I do not desire that my judgment should be understood as going further than it really goes. I rely upon the latter part of the section, and I am of opinion that this case falls manifestly within it.

LORD ESHER, M.R. I am of the same opinion. We have been asked to consider the whole of this section, and to give a judicial opinion as to the true construction of every part of it. It is urged that we ought to construe the section so as to avoid redundancy and ambiguity, and that we ought to construe it having regard to the state of the law when the Act was passed, and that we should endeavour to advance the remedy intended to be given by the statute. This, no doubt, is true; but if we cannot avoid all difficulties, then we must follow the rule that the language of the Act is to be construed according to the ordinary grammatical construction of ordinary English. I decline to give any opinion as to the meaning of the first and second parts of the section; but construing the third part according to its ordinary grammatical construction, I think I can see that this case comes within it. The first part limits the meaning of the word "disputes" in the Acts and rules, and the second part provides that the word shall not apply to any dispute as to the construction or effect of any mortgage deed or contract contained in any document other than the rules of the society. The third part is as follows:—"and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled." According to the true grammatical construction of that clause, I think the word "such" refers to "any mortgage deed or any contract contained in any document other

than the rules of the society," and not to the whole of the preceding clause—that is to say, it does not refer only to any mortgage deed or contract, as to the construction or effect of which there is a dispute. According to this construction, the third part of the section may be read thus:—"and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any mortgage deed or any contract contained in any document other than the rules of the society to which he or the society would otherwise be by law entitled." It may be that this construction leaves difficulties as to the true meaning of the whole section; there may be redundancy and ambiguity in the language, and the section may fall short of the object intended by the legislature; but whatever construction be adopted, a similar result must follow. Applying the rule of grammatical construction, I think the present case is plainly within the third branch of the section. The society is seeking to enforce a remedy in respect of a mortgage deed within the meaning of that clause, and therefore there is no power to stay the action, and the society is entitled to enforce the remedy which it has in the ordinary course of law.

FRY, L.J. The rule of the plaintiff society provides that any dispute arising between the society and a member shall be settled by arbitration.

The present action is brought upon a covenant in a mortgage deed, and the Court below has stayed the action on the ground that the case falls within the rule of the society. This would clearly be so but for the Act of 1884. The preamble to that Act recites that it is expedient to amend the laws relating to building societies; therefore it is material to inquire as to the state of the law before the Act was passed.

There are three sorts of disputes which may occur between a building society and one of its members; first, disputes arising out of the social contract; secondly, disputes collateral to the social contract, such as those arising out of mortgages between the society and its members; and thirdly, disputes entirely extraneous to the social contract, such as a dispute in respect of

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work done by a member for the society. It is clear that the third class of disputes does not come within the scope of the rule in question. But shortly before the passing of the Act of 1884, it was decided in *Municipal Permanent Investment Building Society* v. *Kent* (1) that disputes arising out of contracts collateral to the social contract, the second class of disputes, came within the scope of the rule.

Sect. 2 of the Act of 1884 may be divided into three parts. The first part provides that the word "'disputes' . . . . in the rules of any society shall be deemed to refer only to disputes between the society and a member, or any representative of a member, in his capacity of a member of the society," unless otherwise expressly provided. It is contended that the words "in his capacity as a member" qualify only the words "any representative of a member," but I do not so read them. Looking at the subsequent portions of the section, and having regard to the case of *Municipal Permanent Investment Building Society* v. *Kent* (1), it seems to me that they also qualify the word "member."

The second part of the section provides that the word "disputes" shall not apply to any dispute as to the construction or effect of any mortgage deed in the absence of express provision. It seems to me that the words in the first part of the section, "in his capacity of a member of the society," refer to disputes arising out of the social contract that binds the members of the society together. Then as the most frequent disputes not arising out of that social contract were those arising out of mortgages, the legislature further emphasised, as to these disputes, what had already been impliedly enacted, by providing that in the absence of express provision any dispute as to the construction or effect of any mortgage deed or any contract contained in any document other than the rules of the society shall be entirely outside the arbitration clause. But other questions may arise as to mortgages, besides questions as to their construction or effect; and therefore the Act further provides that the arbitration clause shall not prevent any society or any member from obtaining in the ordinary course of law any remedy in respect of any mortgage. That is the construction of the section to which I incline,

(1) 9 App. Cas. 260.

and whatever may be the true construction of the earlier part, I am clearly of opinion that the present case comes within the third clause.

Appeal allowed.

Solicitors for plaintiffs: *Green & Harteup.*
Solicitor for defendant: *F. P. Sutthery.*

P. B. H.

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[IN THE COURT OF APPEAL.]

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Gas Company—Gas-stoves let for Hire—Exemption from Distress—"Fittings for the Gas"—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 14.

By s. 14 of the Gasworks Clauses Act, 1847, "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas . . . . and such meters and fittings shall not be subject to distress . . . . for rent of the premises where the same may be used":—

Held, reversing the judgment of Mathew, J., that a gas-stove let for hire was within the words "fittings for the gas," and therefore was not subject to distress for rent.

APPEAL from the judgment of Mathew, J.

The action was brought to establish the exemption from distress for rent of gas-stoves belonging to the plaintiff company and let on hire to customers, and supplied with gas by the company. The plaintiffs claimed a shilling damages for the seizure by the defendant as a distress for rent of a gas-stove so let on hire.

Mathew, J., before whom the case was tried without a jury, gave judgment for the defendant, and from this judgment the plaintiffs now appealed.

By the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 14, "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas, for such remuneration in money as shall be agreed upon between the undertakers and any person to whom the same may be so let, and such remuneration shall be recoverable in the same manner as the rents or sums due to the undertakers for gas, and

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such meters and fittings shall not be subject to distress or to the landlord's hypothec for rent of the premises where the same may be used, nor to be taken in execution under any process of a Court of law or equity, or any fiat or sequestration in bankruptcy against the person in whose possession the same may be."

By the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 2, "The Gasworks Clauses Act, 1847 (except so far as the provisions thereof are inconsistent with this Act), is incorporated with and forms part of this Act, and shall apply to the several companies before named or referred to" (of which the plaintiff company is one) "as fully as if the gasworks of the several companies were authorized by this Act."

The Gaslight and Coke Company's Act, 1868 (31 & 32 Vict. c. cvi.), also incorporates the Gasworks Clauses Act, 1847.

By the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), s. 14 of the Gasworks Clauses Act, 1847, is repealed, "except so far as incorporated with special Acts to which 34 & 35 Vict. c. 41, does not apply."

Sir Richard Webster, Q.C., and *Danckwerts*, for the plaintiffs. The words "any fittings for the gas" in s. 14 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), are wide enough to include the gas-stove in question, which therefore is exempt from distress by the words, which occur later in the same section, "such meters and fittings shall not be liable to distress." The Act of 1847 is expressly incorporated and applied to the plaintiff company by s. 2 of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125). There is nothing in any of the other statutes inconsistent with this view.

Crispe, and *G. W. Ellis*, for the defendant. The words of s. 14 of the Gasworks Clauses Act, 1847, do not apply. They are inconsistent with the subsequent legislation contained in the Gaslight and Coke Companies Act, 1868 (31 & 32 Vict. c. cvi.), s. 66, and the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 18. The words of both these sections are "any fittings thereto," which are less comprehensive than the words relied on for the plaintiffs. The Act of 1847 does not include gas-stoves, because at that date, by 50 Geo. 3, c. clxiii., s. 28, the company was prohibited from

supplying gas-stoves. Such an exceptional privilege as that claimed by the plaintiffs could only be conferred by the most distinct language.

Danckwerts, in reply. The words "fittings for the gas" in s. 14 of the Gasworks Clauses Act, 1847, mean instruments adapted and fitted for the use or supply or consumption of gas, and therefore include gas-stoves.

LORD ESHER, M.R. It seems to me that the whole question turns upon the true construction of the 14th section of the Gasworks Clauses Act, 1847. The company is a metropolitan company, and the Act of 1860 applies to it. The Act of 1860 incorporates the Act of 1847, and must be read as if the words of the Act of 1847 had been repeated in the Act of 1860, and although the 14th section of the Act of 1847 is repealed, still the Act of 1860, into which by reference the Act of 1847 is written, is still in existence and applies. Therefore the question must be, what was the meaning of the 14th section of the Act of 1847 at the time at which it was passed? Now I will not say it is impossible to ascertain the interpretation of an Act passed in 1847 by reading an Act which was passed in 1871; if the legislature has clearly put a construction on the former Act in the later Act, then for myself I think one may use the later Act. But it seems to me that there is nothing here in the later Act which enables any one by reading it to construe the Act of 1847. That Act of 1847 must therefore be construed as if we had to read it the day after it was passed. If there were phraseology in the Act which would apparently bear a trade meaning, as, for instance, if the phrase had been "gas fittings," I should have thought that one would have been obliged to look to evidence in order to find out what was the accepted meaning of the phrase "gas fittings" at the time, but there is no such phrase in this 14th section. The phrase is "any fittings for the gas," which is not trade phraseology, and we must read it therefore in the ordinary sense as applied to the subject-matter, which is the supply and consumption of gas. The first words are "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied." Now there is a thing which is used for ascertaining

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the quantity of gas consumed or supplied, which is not the same thing as is used for the supply. Then come the words "and any fittings for the gas;" the meaning of that is not anything for measuring the amount of gas; it is not the meter. The expression is as large as it can be, and, in my opinion, must include all the apparatus which is used for the supply and the consumption of the gas, and therefore includes such a thing as that which we have before us, which is used for nothing else but the supply and consumption of the gas. Therefore it seems to me that it is within those words, and if so it is obvious that by the latter part of the section it is protected from distress. It has been said that it is very strange that the legislature should give this protection to the gas companies, when they do not give it to other people; but the gas companies were about to undertake a new business, and it must have been obvious that, unless they could get this protection, what they supplied to houses would be in danger, in certain houses, of being distrained upon by the landlord, and therefore the commonest foresight would cause the company to ask for the protection. Then if they asked for the protection there is nothing improbable, certainly nothing impossible, in supposing that the legislature would give them that protection for which they asked, and the whole question is whether the legislature has given them that protection. Now when the clause is proposed to the legislature in such large terms as these, "any fittings for the gas," when one sees that the object of the gas company would be to have the words as large as possible, and when one finds the legislature adopting these words, I can see no reason for cutting them down, and no rule of law which entitles us to cut them down. I must therefore in a full and large sense say that they do apply to all the apparatus used for the supply and consumption of gas. Then, as a matter of fact, I think that this is part of the apparatus used for the supply and consumption, and therefore is within the Act. The decision of the Court therefore comes to be partly a decision on the construction of the Act as a matter of law, and partly on the adaptation of that interpretation of the Act, and the application of it, as a matter of fact. For these reasons I think that this gas-stove was protected from distress.

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BOWEN, L.J. I am of the same opinion. The simple question is, what is the meaning of 10 & 11 Vict. c. 15, s. 14? I do not think the later Acts amount to any legislative declaration as to the meaning of the words. The words we have to consider are: "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas." The words are not equivalent to any usual gas fittings. If the words of the section had been "any usual gas fittings," we should have had to inquire what, at the date of the Act of 1847, were the usual gas fittings, and then perhaps to consider whether the term "usual gas fittings" was to be confined to such fittings as were then in use, or whether, on the true construction of the section, it was intended to apply to fittings which became of general use at any subsequent time. The words here are wider; they are, "any fittings for the gas." It seems to me, first of all, that we have not to decide what is the meaning in the abstract of the term "fittings." We have to consider what is the meaning of the term "fittings for the gas," and I think the term "fittings for the gas" means an apparatus adapted for the supply and consumption of the gas. The gas is intended to be burnt either for light or for heat. It appears to me that the legislature when it speaks of "fittings for the gas" means an apparatus to enable the gas to be burnt efficiently and conveniently for light or for heat. It does not appear to me to follow that, under the term "fittings for the gas," an apparatus which is used for utilizing the heat of the gas after it has been burnt could be included. But at all events the words do include, as it seems to me, a machine the only object of which is to burn, and to burn effectively for convenience in the house, the gas which is supplied. I think, therefore, it is a fitting for the gas. It seems to me that the whole of the question turns on these words "fittings for the gas."

FRY, L.J. I am of the same opinion. The Act of 1847 was applied to the company in question by the Act of 1860. It has been argued before us that subsequent legislation has affected that Act of 1847. It has been said that the Gaslight and Coke

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Company's Act, 1868, in the 66th section, contains an enactment which is in pari materiâ, and which ought to be read as cutting down and limiting the effect of the earlier statute. Now it is to be borne in mind that the Act of 1868 itself re-applies to this company the Consolidating Act of 1847 except where expressly varied, and I am unable to find, in the 66th section which has been relied upon, any express variation of the statute of 1847, further than that I think they are both affirmative clauses, and that there is no inference to be drawn from the 66th section of the Act of 1868 inconsistent with the enactment of 1847. Then our attention has been drawn to the other subsequent statutes, the Consolidation Act of 1871 and the repealing statute of 1875, but those only operate upon gas companies which may be formed after the passing of the Act of 1871. They, therefore, do not at all affect the title or right of the plaintiff company. I think, therefore, the sole question we have to determine is the meaning of the words "any fittings for the gas" contained in the 14th section of the statute of 1847. It is perhaps not easy to arrive at a satisfactory conclusion as to the meaning of these words, but that they mean something more than fittings adapted for ascertaining the quantity of gas consumed and supplied, I cannot doubt, because they stand in contrast with the words "any meter for ascertaining the quantity of gas consumed or supplied." I think, therefore, that we must give to the later words, especially in the collocation in which they appear, a much wider signification, and I do not know that any better interpretation can be given than something of this kind, that they include all instruments which are adapted for the supply and beneficial consumption of the gas. In my opinion this instrument before us is such an instrument. The essential part of the instrument is the burners—four burners which lie at the bottom. All the rest is merely a casing round those burners, which probably has a twofold object, the one of accumulating heat and preventing its immediate distribution in the atmosphere, and the other of preventing the escape of the product of combustion. Now those are only adaptations for the beneficial and useful consumption of gas. I think, therefore, that it is a "fitting for the gas" within the

meaning of the section, and, therefore, I am unable to agree with the conclusion of my learned Brother Mathew.

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Appeal allowed; judgment for the plaintiffs.

Solicitors for plaintiffs: *Bedford, Monier Williams, & Robinson.*
Solicitor for defendant: *Edward Clarke.*

P. B. H.

[IN THE COURT OF APPEAL.]

July 5.

VISCOUNT GORT AND OTHERS *v.* ROWNEY AND ANOTHER.

Practice—Costs—Taxation—Joinder of Plaintiffs—Separate Causes of Action—Judgment for one Plaintiff and against the other—Rules of Supreme Court, 1883, *Order XVI., r.* 1.

Two plaintiffs joined in one action, claiming for separate and distinct causes of action. The case was referred, with power to the arbitrator to enter judgment, the costs of the cause to abide the event. The arbitrator found in favour of one plaintiff, and against the other, and entered judgment accordingly. On an application to review taxation of costs:—

Held, reversing the order of Lord Coleridge, C.J., and Fry, L.J., that the successful plaintiff was entitled to recover from the defendant the whole of his general costs of the action, and the defendant was only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff.

APPEAL from an order of the Queen's Bench Division, setting aside two orders made at chambers, and referring back to the master the question of taxation of costs.

The statement of claim in the action alleged that the plaintiffs Viscount Gort and Walford were the owners, and the plaintiff Neuff was the tenant, of a dwelling-house, No. 12, Percy Street, and the defendants were occupiers of premises Nos. 10 and 11 adjoining; that by an agreement between the plaintiff Walford (with the consent of Viscount Gort) and the defendants it was agreed that the defendants should pull down and rebuild Nos. 10 and 11, and in so doing shore up all neighbouring properties, and the defendants subsequently agreed with the plaintiff Neuff to indemnify him from all damage; that the defendants broke the agreement and did the work negligently, whereby No. 12 was damaged.

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Alternatively the plaintiffs alleged a trespass by the defendants to No. 12; that in consequence of their wrongful acts No. 12 became dangerous, and the Metropolitan Board of Works, by notice under statutes, required it to be made secure; and the defendants instead of complying with the notice pulled down the whole of the party-wall and rebuilt it, and had claimed from the plaintiff, Viscount Gort, as adjoining owner, under the Acts, 215*l.* 18*s.* 2*d.* as his proportion of the expenses. That the defendants rebuilt the party-wall negligently, and Viscount Gort had lost rent and incurred cost, and the plaintiff Neuff had lost money profits.

The defence denied the several allegations in the statement of claim.

At the trial an order was made by consent referring the action and all matters in difference to an arbitrator with power to enter judgment. The order provided that the costs of the cause should abide the event of the arbitration, and the cost of the reference should be in the discretion of the arbitrator.

The arbitrator made his award that the defendants should recover judgment against the plaintiff Lord Gort in respect of his claim and costs to be taxed; and that Sarah Neuff, the personal representative of the plaintiff Neuff, should recover against the defendants 96*l.* and costs, to be taxed. Judgment was signed accordingly.

The master's note on taxation of the costs was as follows:—

"In taxing the costs I have, in accordance with the ordinary rule, allowed to the plaintiff Neuff the general costs of such an action as he has succeeded in, but, as he sued jointly with Lord Gort and by the same solicitor, I have considered him entitled to only a moiety of all the costs which were incurred on behalf of both plaintiffs jointly. I have treated these costs as including, besides the general charges in the action, the costs of so much of the statement of claim and the subsequent proceedings —that is, interrogatories and answers thereto, briefs, counsels' fees, witnesses, &c., as appear to be applicable to the cases of both plaintiffs. I have, in addition, allowed to the plaintiff Neuff the whole of all such costs as relate exclusively to his separate claim, and I have excluded altogether from the costs allowed to

the plaintiff Neuff all such costs as relate exclusively to the claim of Lord Gort. In taxing the costs of the defendant against Lord Gort, I have allowed him all extra costs to which he was put by reason of Lord Gort being a plaintiff, and which he would not have incurred if Lord Gort had not been a plaintiff. I have therefore treated the defendant as being entitled against Lord Gort to costs of issues, and not to the general costs of the action, as to which he has the benefit of only having to pay a moiety to the plaintiff Neuff."

A summons, obtained by the defendants to review the taxation of the costs of the plaintiff Neuff and of the defendants, having been dismissed by Field, J., and an order on a summons, obtained by the plaintiff Neuff for a review of the taxation of his costs in order that he might be allowed full costs instead of a moiety, having been made, also by Field, J., at chambers, the defendants appealed from both orders.

May 10. The appeals from chambers were argued before Lord Coleridge, C.J., and Fry, L.J., sitting as a Divisional Court.

Jelf, Q.C., and *J. Martin Routh*, for the defendants.

Moorsom, Q.C., and *W. Wills*, for the plaintiffs.

The following authorities were referred to:—

Griffiths v. *Kynaston* (1); *Gambrell* v. *Earl of Falmouth* (2); *Cain* v. *Adams* (3); *Umfreville* v. *Johnson* (4); *Saner* v. *Bilton* (5); *Mason* v. *Brentini* (6).

Cur. adv. vult.

May 18. The judgment of the Court (Lord Coleridge, C.J., and Fry, L.J.) was delivered by

LORD COLERIDGE, C.J. The most important of the questions arising on these appeals relates to the apportionment of th general costs of the action.

In order to understand the judgment under which the taxation has taken place it is necessary to refer very briefly to the causes

(1) 2 Tyrw. 757.
(2) 5 A. & E. 403.
(3) 5 L. J. (K.B.) 252.
(4) Law Rep. 10 Ch. 580.
(5) 11 Ch. D. 416.
(6) 15 Ch. D. 287.

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of action as appearing on the statement of claim. The plaintiffs are three. Lord Gort and Mr. Walford, who inasmuch as their interests are joint may be considered as a single person, and whom we shall include under the name of the first plaintiff, and a Mr. Neuff. Lord Gort was the owner of a house, No. 12, Percy Street, and Neuff was at the time of the acts complained of, the occupier of that house. The defendants were the occupiers of Nos. 10 and 11, Percy Street, adjoining No. 12, and they were sued in respect of certain building operations carried on by them on or about these two houses. The statement of claim is remarkable, inasmuch as it contains no statement of any joint or alternative claim by the plaintiffs, but alleges certain claims of Lord Gort against the defendants, and certain other and separate and independent claims of the plaintiff Neuff against the same defendants. In short, the statement of claim relies on separate causes of action of the two plaintiffs against the defendants, the only common elements being that the claims arise in part out of the same transactions, and that the defendants are alleged to be alike liable to both plaintiffs. Whether such a union of separate causes of action was contemplated by the Judicature Acts, and whether it was convenient that they should be so united, are questions which we are not called upon to decide.

The action was referred to arbitration, and in accordance with the directions of the arbitrator judgment was signed on the 24th of October, 1885. Thereby, in accordance with the award of the arbitrator, it was adjudged that the defendants recover judgment against the plaintiff Lord Gort in respect of his claim, and costs to be taxed: and that Mrs. Neuff (the legal personal representative of the original plaintiff, Mr. Neuff) recover against the defendants 96*l.* and costs to be taxed.

Now, on this form of judgment we are clearly of opinion that the master was right in taxing in favour of the defendants and as against Lord Gort all such costs as related exclusively to his separate claim, and in favour of Neuff, and against the defendants, all such costs as related exclusively to his separate claim. But then arises the question as to the general costs of the action which remain after the segregation of these separate costs—and these general costs are of course divisible into, first, the plaintiffs'

general costs of the action, and, secondly, the defendants' general costs of the action. Now, as regards the plaintiffs' general costs of the action, it is evident that there is no reason why Lord Gort should not, as against the defendants, bear them, for he was wrong: and again, there is no reason why the defendants should not, as against Neuff, bear them, as they were wrong. As Lord Gort and the defendants are equally liable to bear the whole of these costs, and they ought not to be paid twice, we think that they should each bear a moiety. They are equally entitled to share in the good fortune which has resulted in the trial of two independent causes as if they were one action, and with the expense only of one action.

In like manner as regards the defendants' general costs of the action, there is no reason why Lord Gort should not, as against the defendants, bear the whole of these costs, and, as against Neuff, there is no reason why the defendants should not bear the whole of their costs. In these circumstances, and for the reason already given, Lord Gort and the defendants should bear them in moieties.

The result is that the defendants must pay Neuff one half of the plaintiffs' general costs, and Lord Gort must pay the defendants one half of the defendants' general costs: Lord Gort being left to bear the other half of the plaintiffs' general costs, and the defendants to bear the other half of the defendants' general costs.

It was strongly pressed upon us that such an apportionment of general costs was unprecedented. But to this observation several answers arise. In the first place the judgment is remarkable, and of a kind which certainly could not occur before the Judicature Acts—for one of the plaintiffs entirely fails, and the other succeeds—and it contains two directions for payment of costs, each of which, if it stood alone, would have carried the general costs of the action. But this singularity of the judgment is a natural consequence of the singular character of the action, in which two plaintiffs sought to recover separate and independent damages for separate causes of action. This action is really two actions combined, and the judgment is two judgments rolled into one.

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But in the next place the apportionment of general costs is not without precedent either at common law or in Chancery. In the case of two defendants, where one succeeded and one failed, it was well established by a series of cases that the defendant who succeeded was primâ facie entitled to the whole of his separate costs, and an aliquot part of the joint costs of the defence: *Griffiths* v. *Kynaston* (1); *Griffiths* v. *Jones* (2); *Starling* v. *Cozens* (3); *Cain* v. *Adams.* (4) And in equity, where a part of a bill was dismissed with costs, and relief was given on the residue of the bill with costs, the general costs of the plaintiff were apportioned: see certificate of taxing master in *Saner* v. *Bilton* (5); though the same result did not follow where the plaintiff was directed to pay the amount by which the costs had been increased by a particular claim, or the costs occasioned by the addition of a particular party, as in *Umfreville* v. *Johnson* (6).

No doubt at common law, where a plaintiff has succeeded in part and failed in part, and the costs have been ordered to follow the respective events, the invariable practice has been to give to the plaintiff the entire general costs of the action, and to give to the defendant only the costs exclusively attributable to the issue or issues on which he has succeeded, and this on the ground that, as the defendant made an action necessary, he must pay the general costs of that action. But the reason of this rule does not apply to a case like the present, where two plaintiffs sue on separate causes of action, and where one plaintiff ought never to have brought an action at all, and where, as against the other plaintiff, the defendant ought never to have made the action necessary.

[Having dealt with a subsidiary point as to whether certain paragraphs in the amended statement of claim stated facts applicable to the cases of both plaintiffs, the Lord Chief Justice continued:—]

We shall, therefore, make one order on the two applications, and refer the matter back to the master with a direction that in the costs to be paid by the defendants to Neuff is to be included

(1) 2 Tyrw. 757.
(2) 2 C. M. & R. 333.
(3) 2 C. M. & R. 445.
(4) 5 L. J. (K.B.) 252.
(5) 11 Ch. D. at p. 417.
(6) Law Rep. 10 Ch. 580.

one half of the plaintiffs' general costs; and in the costs to be paid by the plaintiff Lord Gort to the defendants is to be included one half of the defendants' general costs.

Under the circumstances of this case, we give no costs of these appeals.

J. R.

The plaintiffs appealed from this judgment.

1886. July 5. *Moorsom, Q.C.*, and *W. Wills*, for the plaintiffs. The orders made by Field, J., were correct, and the representative of the plaintiff Neuff is entitled to the whole of Neuff's general costs of the action. Before the Judicature Acts the question could not have arisen, because the plaintiffs could not have been joined, but under Order XVI., r. 1, they are rightly joined, for the case comes within the words of that rule: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." The judgment of this Court in *Booth* v. *Briscoe* (1) shews that the present case comes within that rule. The rule points out what costs an unsuccessful defendant is entitled to, namely, the "costs occasioned by so joining any person who shall not be found entitled to relief," and therefore the defendants are entitled only to the costs occasioned by joining Viscount Gort. It is too late at this stage of the proceedings to object to the joinder of the plaintiffs, or to contend that their claims are in substance two separate actions, and the respondents cannot succeed without establishing this, for otherwise the general costs cannot be apportioned. In *Real and Personal Advance Co.* v. *McCarthy* (2) Jessel, M.R., said: "At common law there is no such thing as apportionment of costs. There is an apportionment of costs in equity, but it is of quite a different kind—it is an apportionment of costs between different claims." This was said since the Judicature Acts, and those Acts make no difference in the law so stated: *Sparrow* v. *Hill.* (3)

Jelf, Q.C. (*J. Martin Routh*, with him), for the defendants. There are in substance two separate actions, and the case ought to be treated as if two writs had been issued. If there had been two writs, as there ought to have been, the defendants would

(1) 2 Q. B. D. 496. (2) 18 Ch. D. at p. 368.
(3) 8 Q. B. D. 479.

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have had to pay full costs to Neuff, but they would have recovered full costs from Lord Gort. It is unjust that they should be put in a worse position by the act of the plaintiffs in joining in one writ. Order XVI., r. 1, does not apply, but even if it does there are still two separate and distinct claims. The word "event" in the order of reference is severable; that is, there are really two events—the event as between Lord Gort and the defendants, and the event as between Neuff and the defendants. The same result ought to follow from each event. The main contention was between Lord Gort and the defendants, and in this the defendants have been successful, and ought to recover their costs.

In addition to the authorities above referred to the following were cited: *Pollock* v. *Lester* (1); *Johnson* v. *Mills* (2); *Appleton* v. *Chapel Town Paper Co.* (3); *Myers* v. *Defries* (4); *Stooke* v. *Taylor* (5); *D'Hormusgee* v. *Grey* (6); *In re Brown, Ward* v. *Morse.* (7)

Moorsom, Q.C., was not called upon to reply.

LORD ESHER, M.R. In this case two separate sets of plaintiffs have brought an action against one set of defendants. The plaintiffs were separate, and their rights were separate, and there was not any identical question to be decided as between each set of plaintiffs and the defendants; but no objection was taken on the part of the defendants to the joinder of the plaintiffs. The pleadings were closed, and the defendants took no objection to such joinder; the action came on for trial, and still the defendants took no objection. An order was made by consent to refer the action and all matters in difference to an arbitrator, and no objection was taken, but the proceedings were treated as one action by consent. The words used in the order of reference were "the action," and that order provided that the costs of the action should abide the event. The arbitrator found that, as to the claim of Viscount Gort, the defendants were entitled to succeed, but that the plaintiff Neuff was entitled to succeed as against the defendants, and he entered judgment in the action accord-

(1) 11 Hare, 266.
(2) Law Rep. 3 C. P. 22.
(3) 45 L. J. (Ch.) 276.
(4) 5 Ex. D. 180.
(5) 5 Q. B. D. 569.
(6) 10 Q. B. D. 13.
(7) 23 Ch. D. 377.

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ingly. The arbitrator had not the powers of a judge at nisi prius, and had no power over the costs of the action, for by the order of reference these costs were to abide the event, that is to say, they were to follow the result, as the law directs in the absence of any special direction. If the arbitrator had had power over the costs, he might have given some special direction as to how the costs should go; but having no such power under the order of reference he could not give any such direction. We have, therefore, to decide how the costs are to be taxed according to law, and we must ascertain whether Order XVI., r. 1, directs how they are to be taxed, and whether the present case falls within that rule. This turns on the construction of the rule. The words are: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment." If there were no case in point we should have to construe these words according to the best of our ability, and there might be some difficulty, but their meaning has been settled by the decision of this Court in *Booth* v. *Briscoe.* (1)

In my opinion the proper mode of dealing with authorities which bear upon the question before the Court is to endeavour to ascertain on what ground the decision proceeded, and to accept it as correct if it is the decision of a Court of superior or co-ordinate jurisdiction. It seems to me that the judges who decided the case to which I have just referred construed the rule as meaning that where there are different plaintiffs, who are seeking wholly different relief, they may be joined; that is to say, there is no limit to the power of joinder under the rule; but the power of joinder would be subject to the other rules, and therefore the defendant, if he finds himself embarrassed, may apply to have one of the plaintiffs struck out, or, if the judge thinks that the claims of the different plaintiffs cannot properly be dealt with together, he may make an order to strike out one of the plaintiffs, or may direct that there shall be separate trials. The rule

(1) 2 Q. B. D. 496.

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continues as follows: "But the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person who shall not be found entitled to relief, unless the Court or a judge, in disposing of the costs, shall otherwise direct." I think these words apply as between a plaintiff who has succeeded in the action and a defendant who has failed. The case of *Booth* v. *Briscoe* (1) decides that plaintiffs may be joined unless an order is made to the contrary, and we are bound by that decision. In *D'Hormusgee* v. *Grey* (2) Denman and Manisty, JJ., adopted the same construction, and there was no appeal from their decision. I think the intention of Order XVI., r. 1, was that plaintiffs might be joined, subject to the restrictions imposed by the other rules; but the decision in *Booth* v. *Briscoe* (1) is binding on this Court, and it shews the construction which the judges have laid down and acted on. Assuming that one of two plaintiffs could be struck out on the mere application of the defendant, without shewing that the joinder was embarrassing, in the present case there was what amounted to consent on the part of the defendants, and it is now too late for them to object. My view as to the construction of Order XVI., r. 1, is this: I agree with the decision in *Booth* v. *Briscoe* (1) that the rule gives unlimited power to join different plaintiffs, subject to the other rules. For these reasons I am of opinion that, on the question of the construction of the rule, which I think was not very distinctly brought before the Divisional Court, we are bound to decide in favour of the plaintiffs. The appeal, therefore, will be allowed, and the orders of Field, J., restored.

BOWEN, L.J. I agree in the result, that this appeal must be allowed. By the order of reference the costs were to abide the event, and therefore we have only to consider how the costs would be dealt with according to law in the absence of any special direction: we have no discretion as to the costs. The action was brought by a reversioner and his tenant. The arbitrator held that the reversioner had suffered no damage, and dismissed his claim, but he held that the tenant was entitled to succeed. It is contended on behalf of the defendants that the two separate causes of action remain two actions, and therefore,

(1) 2 Q. B. D. 496. (2) 10 Q. B. D. 13.

either the case does not come within the terms of Order XVI., r. 1, or if it does, still, according to the true construction of that rule, there are two actions. In my opinion it is impossible successfully to contend at this stage of the case that this is not one action so as to come within Order XVI., r. 1. In the pleadings, in the order of reference, throughout the reference, and in the award, it has been so treated; in all the proceedings it has been dealt with on that footing, and it is too late now to object that there should have been two writs and two different actions brought by separate plaintiffs. Order XVI., r. 1, points out how the costs are to be dealt with where the defendant is unsuccessful, but one of the plaintiffs is wrongly joined. The defendant in such a case is entitled, not to half the general costs of the action, which appears to be the contention on behalf of the respondents, but "to his costs occasioned by so joining any person who shall not be found entitled to relief," unless otherwise ordered. I wish to add that I am not prepared now to hold that Order XVI., r. 1, gives unlimited power to join plaintiffs. The rule is framed in a peculiar way; the words are "in whom the right to any relief claimed is alleged to exist," and it is difficult to say that this means the same as "any right." I cannot help thinking that if the framers of the rules had intended to introduce so startling an alteration they would have used more accurate words. I think the Court in *Booth* v. *Briscoe* (1) only held that the action there came within the rule, and that all which the case decides is that the mere fact of a number of separate causes of action being joined does not prevent the case from falling within the rule. I do not wish to decide more than is necessary for the purpose of the present appeal, and if we had to consider whether all plaintiffs may be joined, so many circumstances might arise, which I cannot now contemplate, that I prefer not to decide such a question. The present case has been so treated throughout that the defendants are not entitled to contend at this stage of the proceedings that it does not come within Order XVI., r. 1.

Appeal allowed.

Solicitors for plaintiffs: *Walfords.*

Solicitors for defendants: *Clarke & Calkin.*

(1) 2 Q. B. D. 496.

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July 8, 9.

[IN THE COURT OF APPEAL.]

MACDOUGALL *v.* KNIGHT & SON.

Libel—Privilege—Report of Proceedings in Courts of Justice—Publication of Judgment alone.

A fair and accurate report of the judgment in an action, published bonâ fide, and without malice, is privileged, although not accompanied by any report of the evidence given at the trial.

Defendants published in the form of a pamphlet a report of the judgment delivered in a former action which plaintiff had brought against them. The pamphlet contained no separate report of the evidence given at the trial, and there were passages in the judgment reflecting on plaintiff's character. In an action for libel in respect of such publication the jury found that the pamphlet was a fair, accurate, and honest report of the judgment, and was published bonâ fide and without malice :—

Held, affirming the judgment of Day and Wills, JJ., that it was not necessary to ask the jury whether the pamphlet was a fair report of the trial, that the right questions had been left to the jury, and defendants were entitled to judgment on the findings.

ACTION for libel.

On the 30th of June, 1884, North, J., delivered judgment in favour of the present defendants in an action brought against them by the present plaintiff in the Chancery Division.

The defendants published, and circulated among their customers and friends, a pamphlet, headed by the paragraph read by the Master of the Rolls in giving judgment on this appeal. The rest of the pamphlet consisted in a report of the judgment of North, J., but contained no separate report of the evidence given at the trial. There were passages in the judgment which reflected on the character of the plaintiff, who brought this action to recover damages for the publication of the pamphlet.

At the trial Huddleston, B., left the following questions to the jury :—

1. Was the pamphlet in fact a fair, accurate, and honest report of the judgment of Mr. Justice North ?

The jury found that it was.

2. Was the pamphlet published by the defendants bonâ fide, and with the honest intention of making known the true facts of the case, and in order to protect their reputation, and in reasonable self defence ?

The jury found that it was so published.

3. Was there malice?

The jury found that there was not.

On these findings the verdict and judgment were entered for the defendants.

An application by the plaintiff for a new trial on the ground of misdirection was refused by Day and Wills, JJ., from whose judgment the plaintiff now appealed.

July 8. *Foulkes*, for the plaintiff. There ought to be a new trial on the ground of misdirection in leaving the first question to the jury. The question ought to have been whether the pamphlet was a fair, accurate, and honest report of the trial—not of the judgment. Possibly a report of a judgment may be a fair report of the trial under certain circumstances, as where the judgment states all the facts that have been proved, but whether it is a fair report of the trial or not is a question of fact, which ought to be left to the jury: *Milissich* v. *Lloyds*. (1) A perfectly accurate report of what was said by a judge in giving judgment may fail to convey to the minds of those who read it a correct impression of what the evidence was, and its bearing on the character of an individual. If so it is not a fair report of the trial, and is not privileged.

Blake Odgers, for the defendants. The right question was left to the jury. A correct report of the judgment is necessarily a correct report of what was decided. It cannot be for the jury to say whether the summing-up or judgment of a judge gives a fair statement of what was proved at the trial. To ask them this would be to ask them whether the judgment was right or wrong. Questions as to the conduct of judges in the administration of justice ought not to be submitted to the determination of a jury: *Scott* v. *Stansfield*. (2) It is impossible to report every word of the evidence given at every trial which is reported, and the effect of limiting the privilege, as the plaintiff seeks to limit it, would be to render it practically impossible to report the proceedings in courts of justice.

Foulkes, replied.

(1) 46 L. J. (C. P.) 404. (2) Law Rep. 3 Ex. 220.

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July 9. LORD ESHER, M.R. In this case an action was brought by the plaintiff against the defendants to recover damages for the publication of an alleged libel. At the trial before Huddleston, B., and a special jury, the evidence shewed that the alleged libel was contained in a pamphlet which had been published by the defendants and sent round to the defendants' friends. This pamphlet contained the report of a judgment delivered by North, J., in favour of the defendants, in an action which had been brought against them by the present plaintiff. The pamphlet in question was headed as follows:—

"*MacDougall* v. *Knight & Son.* Report of the judgment of Mr. Justice North given on the 30th of June, 1884, at the Royal Courts of Justice. The reports of the trial in the local papers are so fragmentary and abbreviated as to be bewildering to any one desirous of understanding the case, and in some particulars misleading. Messrs. Knight & Son therefore think it only fair to offer to their friends a verbatim report of the very able judgment of Mr. Justice North, which contains an impartial statement of facts with the conclusions deducible from them, and really gives all the information necessary to be known by any one feeling an interest in the matter.

"Messrs. Knight & Son take this opportunity of expressing the gratitude they feel for the universal sympathy shewn them during the trial."

The pamphlet contained a report of the judgment only.

Huddleston, B., left certain questions to the jury, and on their findings caused the verdict to be entered for the defendants. The plaintiff applied to a Divisional Court for a new trial on the ground of misdirection; his application was refused, and he now appeals from such refusal.

The questions left to the jury were, first, Whether the pamphlet was in fact a fair, accurate, and honest report of the judgment delivered by North, J.; secondly, Whether the pamphlet was published by the defendants bonâ fide, and with the honest intention of making known the true facts of the case and in order to protect their reputation, and in reasonable self-defence; thirdly, Whether there was malice. The jury answered the first two questions in the affirmative, and the third in the negative.

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It is contended on behalf of the plaintiff that the first question which was left to the jury was erroneous, and that it ought to have been whether the pamphlet contained a fair report of the trial, not of the judgment.

The jury have found that the pamphlet contained an accurate report of the judgment, and that it was published bonâ fide and without malice, and the correctness of these findings is not questioned. Therefore the proposition on behalf of the plaintiff is that if a verbatim report of a judgment is published, and the judgment so published reflects on the character of any person, the publication cannot be defended unless a report of all the evidence given at the trial is also published, or, if this is not the proposition, it must then be suggested that the jury should be asked whether the judgment contained a fair and accurate representation of the facts proved. It was decided by the Court of Queen's Bench in Lord Campbell's time in *Lewis* v. *Levy* (1) that public policy justifies the publication of the proceedings in a court of justice, on the ground that the court is open to the public, but cannot hold all the people who may wish to be present, and it is for the public benefit that what takes place in court should be made known to all. Therefore it is not correct to say that what may be published is a fair report of the trial, for it is clear that a fair report of every proceeding in an open court of justice, whether it be a trial or not, may be published. If the trial lasts for several days, all the same people would not be in court on the different days, and in such a case if a fair report of all that takes place on any one day is published, the readers of that report are placed in the same position as if they had been in court on that day and had heard the proceedings. If a fair report of any one distinct part of a trial is published the publication is justifiable, and therefore a fair report of the whole of one day's proceedings is privileged, even if the result is that the publication bears hardly on the character of an individual, who may be in a position at a later stage to answer all that is brought forward against him. If a part of what takes place on a particular day is published as the whole of the day's proceedings, such a publication does not put people who have not been in the court in the same position as

(1) E. B. & E. 537; 27 L. J. (Q.B.) 282.

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those who heard the case in court, and therefore is not a fair publication. In my opinion the word "fair," when used with regard to such a publication as we are discussing, is equivalent to fairly correct; whether a person's mind is fair is involved in the question whether the publication is bonâ fide. The question as to fairness arises only when the report is not "literatim et verbatim;" if it is so no such question can arise. It has been decided, as I have observed, that a report of one day's proceedings may be published, and in the same way the judgment is quite a separate part of the proceedings. Suppose the judgment to be erroneous, still the people who were not in court, but who read the report, are put in the same position as those who were in court and heard the judgment delivered. The responsibility for the accuracy of the judgment rests on the judge who delivers it, not on the person who publishes the report of it.

I am of opinion therefore that an accurate report of a judgment is not libellous. If this is so, the questions left to the jury by the judge in the present case exhaust the matter. The fact of publication in the form of a pamphlet, and not in a newspaper, is to my mind immaterial, and the heading of the pamphlet, which I have read, is clearly not a libel. It appears from the finding of the jury that the pamphlet was published with the bonâ fide intention of letting the outside public know what had been decided; if a garbled account and an unfair representation had been given the answers of the jury would have been different from what they were. I do not for a moment admit that a jury can be asked whether the summing-up of the judge or his judgment in the case of which the report is published was fair or accurate. To hold so would in my opinion be most mischievous, for it would tend to destroy the independence of the judges. For these reasons I am of opinion that the decision of the Divisional Court is right, and ought to be affirmed, and more especially I agree with the judgment of Wills, J.

BOWEN, L.J. It appears to me that it is for the interest of the community that no restriction should be placed on the publication of what judges say in the course of proceedings in courts of justice. Perhaps this view may not always have been adopted,

but as Cockburn, C.J., observed in *Wason* v. *Walter* (1), the law develops itself gradually. In delivering the judgment of the Court in that case the Chief Justice said: "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. . . . . Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the Courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called ex parte proceedings as a probable exception from the operation of the rule. Yet ex parte proceedings before magistrates, and even before this Court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or an indictment founded on a report of such an ex parte proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected" (2.)

This passage shews that the ground on which immunity is extended to the publication of proceedings in courts of justice is that the courts are meant to be public, and therefore an action will not lie for the publication of a true report of their

(1) Law Rep. 4 Q. B. 73. (2) Law Rep. 4 Q. B. at pp. 93, 94.

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proceedings or a report published without malice and in good faith. It is important that the country should know what goes on in courts of justice, and there is also this consideration, that justice is often assisted by the publication of reports of proceedings. It is not only true that no action will lie for the publication of a correct account of all that has passed, but the proposition must be extended so as to include the case of a fair summarised account. The difficulty arises with regard to fragmentary accounts of proceedings. Clearly there would be no protection if a report of a fragment were published as a report of the whole. It is true that a report of a fragment may be published, if it is a complete report of one particular part, as in *Lewis* v. *Levy* (1), the decision in which case shews that the proprietor of a newspaper cannot be held liable for publishing a report of the first day's proceedings before the case is concluded.

I think also that a report of a portion of the case, if correctly given, is privileged, but if it is published maliciously the privilege is destroyed. In the case of a newspaper the publication of proceedings from time to time without malice is undoubtedly privileged; yet it does not by any means follow that a person might publish a true report of a part of the proceedings, if he did so maliciously. I have come to the conclusion that a judgment is such a matter of public interest that a report of it may be published.

It seems to me that public policy requires that the law should be as I have stated, and on this ground I have come to the conclusion that the present appeal fails.

FRY, L.J. The point to be decided, is whether the report of the judgment of North, J., which the defendants have published, is a libel. No doubt it contains statements which would be libellous if the publication were not privileged. The privilege exists on the ground that the more open the proceedings in a court of justice are the better. Then the question arises as to a report of a part of the proceedings. The question here to be decided, I think, is whether the report published is a fair report of that part of the proceedings of which it purports to be a report,

(1) E. B. & E. 537; 27 L. J. (Q.B.) 282.

and if it is so, in my opinion it is primâ facie privileged. No doubt in some instances the fact of the selection of a particular portion of the proceedings for publication may be injurious, but in such a case there would be evidence of malice, and if the jury find that there is malice, the publication is not protected. That the publication of the report of a part of the proceedings may be privileged is shewn by the decision in the case of *Lewis* v. *Levy* (1). No doubt the proprietor of a newspaper which appears from day to day, and a person who publishes a report after the termination of the proceedings, stand in somewhat different positions, but I cannot say that I think it unreasonable to publish the report of a judgment in the way in which this report has been published. We cannot shut our eyes to the fact that it is by no means an uncommon practice to publish a report of the judgment alone, which usually contains in itself a summary of the material facts of the case. In my opinion we are bound to have regard to the ordinary usages of society in this respect, and I entirely agree with the view expressed by Lord Campbell in delivering the judgment of the Court in *Lewis* v. *Levy* (2), where he said, "The law upon such subjects must bend to the approved usages of society, though still acting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and bonâ fide should be protected."

In the present case the jury have found that the report was fair and accurate, and was published bonâ fide and without malice.

For these reasons I am of opinion that the appeal cannot succeed.

Appeal dismissed.

Solicitor for plaintiff: *H. H. Myer.*

Solicitors for defendants: *Torr, Janeways, Gribble & Oddie, for Payne & Fuller, Bath.*

(1) E. B. & E. 537; 27 L. J. (Q.B.) 282. (2) E. B. & E. at pp. 560, 561.

P. B. H.

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July 17.

[IN THE COURT OF APPEAL.]

SMALPAGE *v.* TONGE.

Practice—Original Writ for Service within the Jurisdiction—Issue of concurrent Writ for Service out of the Jurisdiction—Enlargement of Time—Sole Defendant—Rules of Supreme Court, 1883, *Order VI., rr.* 1, 2; *VIII., r.* 1; *LXIV., r.* 7.

Under the Rules of Court, 1883, Order VI., rr. 1, 2, the Court has power to give leave for the issue of a concurrent writ for service out of the jurisdiction, although the original writ was issued for service within the jurisdiction and has been renewed, and although there is only one defendant to the action. And where the writ has been renewed such leave may be given, notwithstanding that the enlargement of time for issuing a concurrent writ may affect the operation of the Statute of Limitations.

MOTION for leave to issue a concurrent writ for service out of the jurisdiction.

In March, 1881, the plaintiff issued a writ in the usual form for service within the jurisdiction. He was unable to serve the defendant with the writ, as he could not ascertain where he was living. He accordingly obtained from time to time orders under Order VIII., r. 1, for the renewal of the original writ, the last of such orders for renewal having been obtained in March, 1886.

The plaintiff had recently discovered the whereabouts of the defendant, and found that he was living out of the jurisdiction at a place in France, where it would be possible to serve him. His right to bring a fresh action having been barred by effluxion of time, he made the present application.

In support of the application evidence was produced shewing that at the time the original writ was issued the plaintiff was unable to find the defendant, that the defendant had left his residence near London and gone abroad for the purpose of evading his creditors, that efforts had from time to time been made to ascertain his whereabouts from his brother and otherwise, but that until quite recently, when it was discovered that he was residing in France, such efforts had been entirely unsuccessful.

The Queen's Bench Division (Wills and Grantham, JJ.) refused the application upon the ground that it was concluded by *Cole*

v. *Sherard* (1), and that an enlargement of time ought not to be granted when it would affect the operation of the Statute of Limitations.

The plaintiff appealed.

Percy Gye, for the plaintiff. Order VI. provides (rule 1) that a plaintiff may issue a concurrent writ within twelve months after the issue of the original writ, and that such concurrent writ shall only be in force while the original writ is in force; and (rule 2) that a writ for service out of the jurisdiction may be issued as a concurrent writ with one for service within the jurisdiction. And Order VIII., r. 1, while providing that no original writ shall be in force for more than twelve months from the day of the date thereof, empowers the Court, on the application of the plaintiff within the twelve months, to order that the original or concurrent writ be renewed for six months from the date of renewal, and so from time to time during the currency of the renewed writ, and such renewed writ is to remain in force and "be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons." The meaning of the expression "for all other purposes" must be that whatever may be done on an original writ may be done on a renewed writ. Then by Order LXIV., r. 7, the Court or a judge has power to enlarge the time appointed by the rules "for doing any act or taking any proceeding," and such enlargement may be ordered, although the application is not made until after the expiration of the time allowed. Here the original writ has been duly renewed from time to time and is still in force, and the Court has a discretionary power to permit the issue of a writ for service out of the jurisdiction, to be issued as a concurrent writ with the original writ issued in this case for service within the jurisdiction, notwithstanding the lapse of time since the issue of the original writ. *Doyle* v. *Kaufman* (2) is no authority against this application, for in that case the original writ had ceased to be in force, owing to the default of the plaintiff in neglecting to renew, and the right of action was altogether gone, for the Statute

(1) 11 Ex. 482. (2) 3 Q. B. D. 7.

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of Limitations had run between the expiration of the twelve months, and the time of the application to renew the writ. No difficulty arises from the fact that there is only a single defendant to this action, for it is clearly within the contemplation of the rules that a concurrent writ may be issued in such a case. He also referred to *Cole* v. *Sherard* (1), *Charrington* v. *Witherby* (2), *Re Jones, Eyre* v. *Cox* (3), and *Canadian Oilworks Corporation* v. *Hay*. (4)

July 17. COTTON, L.J. (after stating the facts of the case). As I understand it, one of the principal reasons why the Court of Queen's Bench declined to make this order was, that they considered that, having regard to the date of the issue of the original writ, they ought not, or had not the power, to enlarge the time for issuing a concurrent writ. Order VI., r. 1, no doubt fixes the period of twelve months from the issuing of the original writ, as the time within which a plaintiff must apply for the issue of a concurrent writ. But that is a limited time within which he is to do an act; and power is given to us, under the 7th rule of Order LXIV., to enlarge the time for doing any act, so that, in my opinion, that difficulty ought not to prevail. Of course we have to consider whether we ought under the circumstances to enlarge the time, and to make the order for the issue of a concurrent writ to be served out of the jurisdiction in a case in which there is but one defendant. These are the difficulties we have to consider. With regard to there being only one defendant, although that struck us as a difficulty when we heard the case yesterday, yet, in my opinion, that circumstance does not in any way prevent the issue of a concurrent writ. We have ascertained, since yesterday, from one of the masters, what, irrespective of the rules, was the practice; and it appears that concurrent writs have been, and are sometimes still, issued in cases where there is only a single defendant; and it seems to me within the principle which enables concurrent writs to be issued at all. The object of issuing concurrent writs, where there are several defendants, is to enable service to be effected upon each of them. If

(1) 11 Ex. 482.
(2) 23 Sol. Journ. 230.
(3) 46 L. J. (Ch.) 316.
(4) W. N. 1878, p. 107.

there was a single defendant, sometimes resident in England and sometimes abroad, it would be advisable to have the power of serving him at the place where, for the time being, he might be. That being so, the issue of concurrent writs in cases where there is only one defendant, seems to be within the principle which enables concurrent writs to be issued at all.

The next point which we have to consider is this. The original writ was issued only for service within the jurisdiction, that is to say, it was not a writ to be served out of the jurisdiction; and, apparently, the Orders do not enable a writ, when it is once issued for service within the jurisdiction, to be served out of the jurisdiction; liberty must be obtained to serve a writ out of the jurisdiction before the writ can be issued. That really comes to this, that the different writs, one for service in the jurisdiction and one for service out of the jurisdiction, are in different forms. There is, in reality, no difficulty as regards the issuing of a concurrent writ to be served out of the jurisdiction, from the fact that the original writ was one to be served only within the jurisdiction; because rule 2 of Order VI., expressly provides for that. "A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction."

Then we must look at the circumstances of the case to see whether we ought to enlarge the time, and to authorize this concurrent writ to be issued for service out of the jurisdiction. It appears from the evidence that at the time when the original writ was issued the defendant was nowhere to be found; and it appears also that he left his residence near London for the purpose of evading this creditor who is now suing him, and went abroad for the purpose of evading his creditors generally; and that efforts have been made to ascertain his place of residence from his brother, which were ineffectual until lately, when the plaintiff ascertained that the defendant was living in France. If this writ for service out of the jurisdiction is not issued the plaintiff may probably be unable to make this present action effectual against the defendant; and if that occurs a new writ

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would have to be issued to be served out of the jurisdiction, unless any action so brought would be barred by the statute. The plaintiff's right of action has not gone, for the original action has been kept alive. There have been ineffectual attempts to serve the defendant, and the original cause of action has been kept alive by leave given to renew. We are not asked to give leave to renew a lost cause of action, but to make the writ effectual and enable the plaintiff to serve the writ abroad, which will make the defendant come in or attend, or enable the plaintiff to proceed without the defendant coming in at all. In my opinion it will be right, under the circumstances of the case, to enlarge the time and allow this concurrent writ to be issued to be served out of the jurisdiction. There was one case cited which I think I ought to mention, *Doyle* v. *Kaufman*. (1) We were referred to it very fairly, because it was supposed it might be against the application. But in that case the application was for the renewal of a writ which the plaintiff had neglected to renew in due time, and which had ceased to be in force through his own negligence. There the right of action was gone, and the Court held that as the right of action had gone by the default of the plaintiff, it would be wrong to give him an opportunity of reviving that which he had already lost. Here the right of action still continues, and we are only asked to make the action effectual by ordering service out of the jurisdiction.

LINDLEY, L.J. I am of the same opinion. The point raised in this case is important, and so far as I know has never arisen before. There is only one defendant to this action, which was commenced the 18th of March, 1881, by a writ in the ordinary form, for service in England, and the plaintiff, who has taken every pains to find him, has satisfied the judge in chambers, from time to time, of his inability to serve this writ on such defendant, and he has from time to time procured the renewal of the writ, the last renewal being made as late as May, 1886. Therefore the writ, old as it is, is still alive, and if the defendant were in this country it could be now served upon him, and the action proceeded with in the ordinary course.

Now we have not had the opportunity of seeing a note of the

(1) 3 Q. B. D. 7.

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judgment of the Divisional Court, but, as I understand it, that Court, having regard to the length of time which has elapsed since the original writ was issued, were of opinion that they could not enlarge the time for issuing a concurrent writ, which, under Order VI., r. 1, is twelve months after the issue of the original writ. What was the precise view taken by the Divisional Court of their power to enlarge the time under Order LXIV., r. 7, I do not know. They seem to have thought it did not apply; for what reasons are unimportant. They refused the application of the plaintiff, hence the appeal to us. Now in the first place we have to consider whether the enlarging power given by Order LXIV., r. 7, applies to the time limited by Order VI., r. 1, for the issue of concurrent writs; and I confess I am unable to see why it should not. There is no more difficulty under Order LXIV., r. 7, in extending a time limited by Order VI., r. 1, than in extending any other time limited by the rules. Of course it must be a question in each case whether it is just and right that the time should be extended. If the Court should be of opinion that it is just and right to extend the time for issuing a concurrent writ, it seems to me Order LXIV., r. 7, gives ample power in that respect. That difficulty having been got over we have to consider other points.

In the first place, it struck me as a novelty to have a concurrent writ issued where there is only one defendant. The ordinary question of concurrent writs arises where there are several defendants, and it is extremely inconvenient to serve them with the original writ. I was not aware until to-day that concurrent writs were issued where there was only one defendant, but on inquiry from a very experienced Master he tells us that concurrent writs have been issued, and are still issued, in cases where there is only one defendant. The cases in which they are issued are cases in which there is a travelling defendant, so that you do not know where to find him. You issue your writ and your concurrent writ, and you send your writ to one place where you think you can catch him, and by means of the writ and the concurrent writs you do catch him. Then it is a question of costs whether those concurrent writs are allowed, or only one of them. Therefore, there is that reason for the issue, and there is no

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reason against the issue of concurrent writs in cases where there is only one defendant, and the difficulty which occurred to me really does not exist.

That difficulty having been got rid of, is there any reason why concurrent writs should not be issued with the leave of the Court against a defendant abroad, in a case where the original writ was issued in the ordinary form for service within the jurisdiction. That difficulty again, I think, disappears when one looks at the rules and applies one's mind to their interpretation. Order II., r. 4, is important. It says: "No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the Court or a judge." It follows from that that the original writ in this case having been issued in the ordinary form, cannot now be served out of the jurisdiction, even with the leave of the Court or a judge; but it does not follow that the concurrent writ cannot be so issued and served. It is obvious that the Court, by ordering the issue and service of concurrent writs, is not contravening, but it is practically complying with, Order II., r. 4.

Then our attention was called to the language of Order VI., r. 2, which seems to contemplate a case of the original writ issued against a person supposed to be in the jurisdiction, without leave, in the ordinary way, and its being afterwards discovered that he is out of the jurisdiction, and leave given for concurrent writs to be issued. Looking narrowly at the language of r. 2, it seems to me that the case is provided for, and therefore there is nothing in the rules which prevents the Court from authorizing the issue and service abroad of concurrent writs, although the original writ was issued in the ordinary form for service in this country. Having cleared away all these difficulties, there remains only to be considered the question whether in this case it is just and right that the Court should exercise its power and give this leave. That depends, of course, upon the evidence, and we are satisfied that it is a case in which it will be right and proper to grant the leave required. We are not giving the plaintiff leave now to revive a barred cause of action; we are merely removing from his way an impediment to the service of his writ.

This case is not like the case which was referred to by

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Cotton, L.J., in which the Court was asked to allow the writ to be renewed after the Statute of Limitations was a bar. This writ has been renewed from time to time, and if the defendant came over here the action could go on against him.

It appears to us, having regard to all the circumstances, that it will be expedient and just to authorize the issue of the concurrent writ.

COTTON, L.J. We therefore, enlarge the time and authorize the concurrent writ to be issued for service out of this jurisdiction at the place mentioned or elsewhere in France, and the defendant will have fourteen days after service of the writ to appear thereto.

Appeal allowed.

Solicitors for plaintiff: *G. S. & H. Brandon.*

W. W. K.

THE TYNE BOILER WORKS COMPANY, APPELLANTS; THE OVERSEERS OF THE PARISH OF LONGBENTON AND THE ASSESSMENT COMMITTEE OF THE TYNEMOUTH UNION, RESPONDENTS.

March 26; *April* 25.

Poor-rate—Rating of Boiler Works—Machinery and Plant capable of being removed without Injury or Structural Damage—6 & 7 Wm. 4, c. 96, s. 1.

In assessing premises used as boiler works to the poor-rate, machinery and plant which are essentially necessary to the business, and which are intended to remain attached to the premises so long as they are used for their present business, may be taken into account as enhancing the rateable value of the property, although they are not so affixed to the soil as to form part of the freehold, and can be removed without injury to themselves or structural damage to the freehold.

Laing v. *Bishopwearmouth* (3 Q. B. D. 299) discussed and followed.

CASE stated under 12 & 13 Vict. c. 45, s. 11, of which the following are the material facts:—

The appellants appealed against a poor-rate made on the 28th of June, 1884, whereby they were rated in respect of premises occupied by them in the parish of Longbenton and described in the rate-book as "Boiler works; land;" the ground of appeal being that they were overrated in respect of the same.

The appellants were the tenants and occupiers of premises

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known as the Tyne Boiler Works, comprising a large area of land, part of which was covered by a large brick building roofed in, and by certain offices or boiler sheds, while the remainder was uncovered by buildings. The proximity of the premises to the River Tyne made them suitable for boiler works, but at successive periods previous to their being occupied by the appellants they had been used for manufactures or purposes of different kinds.

The premises were held by the appellants as assignees of a term of seventy-five years created in 1864. In 1868 or 1869 the then assignees of the term erected the brick building and placed in it the following machinery and plant: (1) the main engine, which was fixed by iron screw bolts to masonry foundations in which a well was constructed for the fly-wheel; (2) a boiler, which was set on a brick seating in a building or shed outside the main building, the steam being conveyed from it to the main engine through iron pipes passing through the wall of the main building; (3) certain shafting and machinery used by the appellants for the purpose of making boilers and erecting machinery on board vessels and making forgings. The appellants after they became assignees of the term and occupiers of the premises purchased and placed on them other machinery and plant for the purpose of use in their business. Certain portions of this machinery and plant were not attached either to the soil or the building, but rested by their own weight on the ground or on cement or stone foundations specially prepared for them; the remainder was fixed in the following ways: the main shafting, which ran along the entire wall of the main building, was supported by the main wall by means of bracket bearings on iron plates fixed to the wall buttresses by screw bolts; two hand-power travelling cranes ran along the main building on rails laid on balks of timber resting on brackets which formed part of the columns supporting the roof; three wall drills were bolted to iron brackets which were fastened by screw bolts to the main wall; blast pipes ran underground, supplying air from the fan-blast to the moveable smithy fires, and water pipes passed underground to the hydraulic accumulators and pumps; jib cranes were attached to the iron columns supporting the roof of the main building. With these exceptions, and with the exception

of a small quantity of plant fastened in one of the ways previously described, the whole of the machinery and plant were held in position in the following manner: A foundation of stone, timber or concrete was prepared for the individual machine. Into this foundation bolts were let and fastened by lead or cement. The machine was hoisted by a crane over the foundation and let down in such a manner that the holes pierced in the bed-plate of the machine slid over the bolts placed in the foundation, and a nut was then screwed on to the top of each bolt to steady the machine. All the machines were worked by belts from the main shafting. When a machine had to be removed the nuts were unscrewed and the machine hoisted up over the bolts which remained in the foundation.

The whole of the machinery and plant were the property of the appellants and not of the freeholders.

All the machinery and plant were required for the purpose of boiler making and were arranged and adapted for use upon the premises for manufacturing and setting up boilers, and were used by the appellants for such purpose, but further than appeared in the case there was not any intention on the part of the appellants of making such machinery and plant part of the soil or hereditaments, or of permanently annexing them thereto.

The machines and plant could be and were taken down and removed when and as required for repairs or re-arrangement, or for any other purpose, without injury to themselves or structural damage to the hereditaments.

The object of the attachment of the machines was to steady them, and it did steady them, in working; and the method of attachment was convenient when occasion arose for their removal.

The mode in which the rateable value of the premises was arrived at was by ascertaining the gross estimated rental which a tenant from year to year might reasonably be expected to be willing to give for the use of them (inclusive of the machinery and plant) and by making the statutory deductions from such rental.

The appellants contended that the machinery and plant were not any of them part of the freehold or hereditament, but were chattels, and that they were not, nor were any of them, rateable

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or to be taken into consideration as enhancing the rateable value of the hereditaments.

The respondents contended that the machinery and plant were necessary to the beneficial occupation of the premises as boiler works, that being the business to which they were appropriated, and that they ought to be taken into consideration as enhancing the rateable value of the premises to which they were attached.

The sessions considered that the case of *Laing* v. *Overseers of Bishopwearmouth* (1) was conclusive, and held that the machinery and plant had been rightly taken into consideration in estimating the rateable value of the premises, but stated a case for the opinion of the Court.

The question for the Court was whether the decision of quarter sessions was correct or incorrect, and if incorrect, in respect of what items, matter, or principles?

R. T. Reid, Q.C., and *Cyril Dodd*, (*Sir H. Davey, S.G.*, with them), for the appellants. These machines cannot be taken into consideration as increasing the rateable value of the premises unless they are so affixed as to be part of the inheritance; it is not sufficient that they should be "fixtures" in the ordinary sense of the word, for every fixture is not necessarily a part of the premises to which it is affixed. The test is whether they are removable integre, salve, et commode, and whether they are intended to be permanently used on the land and therefore to benefit the inheritance. In *Reg.* v. *Lee* (2) the machinery which was held to be rateable was attached to the premises for their permanent improvement; but the mere intention to keep machinery on the premises so long as the same business is carried on upon them does not make the improvement permanent; "permanence" means the same thing as attaching the machinery to the inheritance so as to become part of it, and it is expressly found in the case that the appellants did not intend a permanent annexation. The intention that the articles shall be part of the land has since been approved of as the true test of their rateability: *Reg.* v. *Halstead* (3); *Chidley* v. *West Ham* (4). The

(1) 3 Q. B. D. 299.
(2) Law Rep. 1 Q. B. 241.
(3) 31 J. P. 373.
(4) 32 L. T. 486.

respondents will rely on *Laing* v. *Bishopwearmouth* (1); but if that case is intended to lay down the principle that machinery not so affixed as to become part of the premises may be considered as enhancing the rateable value of the premises, it is inconsistent with previous decisions. The point really decided in that case was that the value of machinery may be regarded if it forms part of the premises, but it does not dispense with the cardinal principle that it must be part of the premises, which depends on two considerations: first, whether it is so affixed as to be part of the freehold, and, secondly, what is the object of the annexation. They also cited *Hellawell* v. *Eastwood* (2); *Holland* v. *Hodgson* (3); *Reg.* v. *Guest* (4); *Reg.* v. *Southampton Dock Co.* (5).

Sir R. E. Webster, Q.C., *W. Graham*, and *John Edge*, for the respondent. The question is not whether these machines are fixtures as between landlord and tenant, or would belong to a mortgagor against a mortgagee, or are rateable per se, but whether they are attached to the land for the purpose of carrying on a permanent business, and may be taken into account in assessing the rateable value of the premises. Real property ought to be rated according to its actual value as combined with the machinery attached to it: *R.* v. *Birmingham and Staffordshire Gas Light Co.* (6); *Reg.* v. *Guest* (4): and the old principle that where machinery is used, and as long as it is used, as a part of premises specially adapted to a particular purpose, so that the premises cannot be used for that purpose without it, it must be taken into consideration as enhancing the rateable value of the property, has been re-enunciated in *Laing* v. *Bishopwearmouth* (1); that case made no alteration in the law. It is not necessary that machinery should be permanently attached in the sense that it thereby becomes part of the freehold; it is sufficient if it can be taken to be intended to remain permanently attached so long as the premises are used for their present purpose, and the test is, "what as between landlord and tenant would pass as a part of the premises which the landlord would let and the tenant would

(1) 3 Q. B. D. 299.
(2) 6 Ex. 295; 20 L. J. (Ex.) 154.
(3) Law Rep. 7 C. P. 328.
(4) 7 Ad. & E. 951.
(5) 14 Q. B. 587; 20 L. J. (M.C.) 155.
(6) 6 Ad. & E. 634.

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take:" *Reg.* v. *Lee* (1), per Lush, J. at p. 257. If none of these machines are rateable, although as long as they are there they are essentially necessary to the premises as boiler works, then the premises are no longer rateable as boiler works at all.

The judgment of the Court (Mathew and A. L. Smith, JJ.) was delivered by

MATHEW, J. This is a case stated by quarter sessions to determine whether the premises occupied by the appellants as a boiler factory have been properly rated to the poor-rate. The property in question comprised upwards of 5000 square yards of land by the River Tyne, held under a lease for a long term of years, and upon which a large brick building had been fitted up with machinery and plant for the purpose of making boilers and erecting them on board vessels. In arriving at the rateable value the plant and machinery had been taken into consideration as enhancing the value of the premises, but as they were not so affixed to the soil as to form part of the freehold, it was insisted by the appellants that they ought not to be taken into account in assessing the premises.

It was admitted upon the argument of the case by the learned counsel for the appellants that the justices had properly applied the principle laid down in the cases from the case of *Rex* v. *St. Nicholas, Gloucester* (2), decided in 1783, to that of *Reg.* v. *North Staffordshire Railway Co.* (3) decided in 1860; namely, that when things, although capable of being removed, are permanently connected with the land, and are intended to be used while so connected for the purpose for which the land is employed, they must be taken into account in assessing the rateable value of the premises. It was contended before us on behalf of the appellants that more recent cases had overruled those decisions, and had established that unless the machinery was annexed to the freehold for the purpose of improving the inheritance, and came within the definition of what is a fixture in the strictest sense, it ought not to be taken into account. Reliance was placed upon the language of Cockburn, L.C.J., and of Black-

(1) Law Rep. 1 Q. B. 241.
(2) 1 T. R. 723.
(3) 30 L. J. (M.C.) 68.

burn, J., in *Reg.* v. *Lee* (1), and upon the decisions in *Reg.* v. *Halstead* (2) and *Chidley* v. *West Ham.* (3) In the case of *Reg.* v. *Halstead* (2), the machinery was worked by steam power and used in a silk mill in weaving silk, being affixed to the floor by iron screws. It was held that it ought not to be taken into account in estimating the rateable value of the mill on the ground that the machines were chattels only. In *Chidley* v. *West Ham* (3), it was said that the plant of a distillery, including tanks so large as to form the entire roof of the building, mash tubs, pumps, and reservoirs, although attached permanently to the soil, were not fixtures and did not contribute to the rateable value of the premises. On examining these cases closely it seems to us that they fail to support the appellant's case. In *Reg.* v. *Lee* (1) the judges recognised the full authority of the previous decisions, and only as an alternative ground for their judgments treated the plant of gasworks as in the nature of fixtures incorporated with the land on which they were placed. In the *Halstead Case* (2) the Court does not seem to have decided more than that the conclusion come to at quarter sessions, that the articles in question were mill furniture only, could not be wrong in law. In the case of *Chidley* v. *West Ham* (3) the question submitted to the Court was whether the articles in question were rateable, and not whether they should be taken into account in determining the rateable value of the distillery, and while a doubt was expressed, which would seem to have been well founded, whether the Court was answering the questions intended to be put, the judges held that the articles per se were not rateable unless they formed as fixtures part of the premises rated.

Further, we have had before us what appears to be a full report of the argument and judgment in *Laing* v. *Bishopwearmouth.* (4) That was the authority upon which the court of quarter sessions acted in this case. It was argued in that case as in this, that the recent decisions to which we have referred had thrown doubt upon what had previously been supposed to be the law, but the Court declined to accept that view, and repeated the rule in terms which seem to us clearly applicable to the

(1) Law Rep. 1 Q. B. 241.
(2) 31 J. P. 373.
(3) 32 L. T. 486.
(4) 3 Q. B. D. 299.

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present case, namely, that machinery ought to be taken into account where the whole of it is essentially necessary to the business to which the premises are devoted, and where it is manifest that it is intended to remain connected with the premises so long as they are used for the same purpose. Here the land and machinery combined are used for carrying on the business, and there seems to be no reason why the combination which is essential to this use of the land should not be rateable. We think that the order of the justices must be upheld.

Judgment for respondents.

Solicitors for appellants: *Flux & Leadbitter, for Leadbitter & Harvey, Newcastle-on-Tyne.*

Solicitors for respondents: *Crossman, Crossman & Pritchard, for Kidson, McKenzie & Kidson, Sunderland.*

W. J. B.

July 23; *Aug.* 12.

DIXON *v.* FARRER, SECRETARY OF THE BOARD OF TRADE.

Crown, Prerogative of—Right to Trial at Bar—Merchant Shipping Act, 1876, (39 & 40 *Vict. c.* 80), *s.* 10—*Detention of Ship for Survey—Action against Board of Trade—Interest of Crown—Change of Venue—Crown Suits Act*, 1865 (28 & 29 *Vict. c.* 104), *s.* 46.

By the Crown Suits Act, 1865, s. 46, where in any cause in which the Attorney General is entitled on behalf of the Crown to demand as of right a trial at bar he states to the Court that he waives that right, "the Court on the application of the Attorney General shall change the venue to any county he may select":—

Held, that an action under 39 & 40 Vict. c. 80, s. 10, against the Secretary of the Board of Trade, to recover damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the Attorney General is entitled to demand as of right a trial at bar in such an action, and that the Court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried.

MOTION on behalf of the defendant that the cause being one in which the Attorney General on behalf of the Crown was entitled to demand as of right a trial at bar, and the Attorney General stating to the Court that he waived his right to a trial at bar, the venue might be changed to the city of London.

The action was by a shipowner against the Secretary of the

Board of Trade, under 39 & 40 Vict. c. 80, s. 10, to recover damages for wrongfully, improperly, and without reasonable and probable cause detaining his ship for survey. The ship was detained while in harbour at North Shields for survey under 39 & 40 Vict. c. 80. The plaintiff having laid the venue at Newcastle, the Attorney General moved to change it to London.

Sir W. Phillimore, and *J. Aspinall,* shewed cause. The right of the Crown to change the venue depends on s. 46 of the Crown Suits Act, 1865, 28 & 29 Vict. c. 104 (1), and unless the Crown would have a right to a trial at bar it has no right to change the venue. The Crown has a right to a trial at bar only when it is actually and immediately interested in the cause: Chitty's Archbold, p. 586, and the cases there cited. It has the right if the cause is one which touches the private revenues of the duchies in the hands of the Crown, or the hereditary revenues of the Crown; but this cause can in no way affect the Crown, for if compensation has to be paid it will be paid out of a fund provided by fees and by parliament. (2) In *Rowe* v. *Brenton* (3) a trial at bar was granted because the case touched the revenues

(1) 28 & 29 Vict. c. 104, s. 46: "Where a cause in which Her Majesty's Attorney General on behalf of the Crown is entitled to demand as of right a trial at bar, is at any time depending in any of Her Majesty's superior Courts of Law at Westminster . . . . and the Attorney General states to the Court that he waives his right to a trial at bar, the following provisions shall have effect: (1.) The Court, on the application of the Attorney General, shall change the venue to any county in which the Attorney General elects to have the cause tried."

(2) 39 & 40 Vict. c. 80, provided by s. 39, that compensation payable by the Board of Trade in pursuance of that Act should be paid out of moneys provided by parliament. That part of s. 39 has been repealed by 45 & 46 Vict. c. 55, which enacts in s. 3, "There shall be charged on and payable out of the Mercantile Marine Fund the following sums, so far as they are not paid by any private person: (*a*) The salaries of all surveyors and officers appointed, and all expenses incurred in connection with the survey and measurement of ships under the Merchant Shipping Acts, 1854 to 1876."

The Mercantile Marine Fund is formed from various fees enumerated in s. 4 of the Act, and by s. 5, "there shall be paid to the Mercantile Marine Fund out of moneys provided by parliament an annual sum of forty thousand pounds . . . ." If 45 & 46 Vict. c. 55, does not include compensation payable by the Board of Trade in such an action still, on general principles, parliament would vote the necessary sums.

(3) 8 B. & C. 737.

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of the Duchy of Cornwall, and there was at that time no Prince of Wales, so that those revenues were then in the hands of the Crown. In *Lord Bellamont's Case* (1) the Crown would have paid the damages out of its private revenues, so that the prerogative right applied, and that is the distinction between that and similar cases relied on by the Crown and the present case. The Crown is not even in name or form a party to this action, it is not interested in it, the result can in no way affect the dignity, privileges, or property of the Crown.

They referred also to *Rex* v. *Webb* (2); *Attorney General to the Prince of Wales* v. *Crossman* (3); *Attorney General* v. *Churchill*. (4)]

Sir C. Russell, A.G., and *R. S. Wright*, in support of the application. The Crown would have a right to a trial at bar, for this is an action against the defendant as a public officer acting under the instructions of a department of State. The Board of Trade is the real defendant, the damages will be paid out of moneys to be provided by parliament; but that makes no difference, for according to constitutional law payments of such moneys are payments to the Crown, and the ministers are servants of the Crown, so that the Crown is interested in an action such as this: *Reg.* v. *Lords Commissioners of the Treasury*. (5) The Judicature Acts have not altered the law on this subject: *Attorney General* v. *Constable* (6); the old cases are still applicable, and such cases as *Rowe* v. *Brenton* (7), *Buron* v. *Denman* (8), and *Lord Bellamont's Case* (1), are conclusive in favour of the right of the Crown to have a trial at bar, and therefore to change the venue.

Cur. adv. vult.

Aug. 12. The following judgments were delivered:—

FIELD, J. An action has been brought by a shipowner against the Board of Trade under 39 & 40 Vict. c. 80, s. 10, for compensation for the detention of his ship for provisional survey without reasonable and probable cause. The action is brought pursuant to the provisions of that section against the Secretary of the Board

(1) 2 Salk. 625.
(2) 1 Sid. 412.
(3) Law Rep. 1 Ex. 381.
(4) 8 M. & W. 171.
(5) Law Rep. 7 Q. B. 387.
(6) 4 Ex. D. 172.
(7) 8 B. & C. 737.
(8) 2 Ex. 167.

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"by his official title as if he were a corporation sole." The plaintiff laid the venue at Newcastle, the ship having been detained at North Shields, and thereupon the Attorney General came into Court, according to the practice in such cases, and alleged that this cause being one in which the Crown is entitled to demand a trial at bar, the Crown was willing to waive that right, and he therefore claimed, pursuant to the provisions of 28 & 29 Vict. c. 104, s. 46, to have the venue changed to any county which the Attorney General might select, in this case to the city of London.

Sect. 46 of the Crown Suits Act, 1865, 28 & 29 Vict. c. 104, enacts that, "Where a cause in which Her Majesty's Attorney General on behalf of the Crown is entitled to demand as of right a trial at bar is at any time depending in any of Her Majesty's superior Courts of Law at Westminster . . . . and the Attorney General states to the Court that he waives his right to a trial at bar, the following provisions shall have effect: (1.) The Court on the application of the Attorney General shall change the venue to any county in which the Attorney General elects to have the cause tried. . . . ."

The Attorney General having in the manner prescribed by and on the grounds stated in that section applied to the Court to change the venue, the question arises whether in an action such as this, the Crown is interested so as to be entitled to demand a trial at bar.

Originally, every cause was tried at the bar of the Court itself, and then for convenience the practice obtained of continuing the cause from term to term provided the justices in Eyre did not previously come into the county where the cause of action arose. The Statute of Westminster 2 (13 Edw. 1, c. 30), gave the writ of nisi prius; but that statute did not bind the Crown, so that the Crown still retained the privilege of having a cause to which it was a party or which touched its rights tried at Westminster, and the practice has been uniform that where the Crown is interested the Attorney General may demand a trial at bar as of right. The Crown may be interested because it is a party to the suit, or it may be privy in interest, or though the litigation is between two subjects still the Crown may be interested, and

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may, therefore, claim an interest as though it were actually a party.

Rex v. *Hales* (1) was a criminal case in which the Crown was the prosecutor, and the king obtained a trial at bar as of right in his own cause. *Rex* v. *Webb* (2) was a civil cause in which the Crown sued in trover and conversion, and it was held that in such an action the Crown had the prerogative of trying its personal actions where it pleased, and this principle was reaffirmed in *Attorney General* v. *Churchill.* (3) In *Attorney General* v. *Barker* (4) the Crown was lady of the manor, and it was held that the Crown was interested in an action of trespass brought by a tenant of the lady of the manor against a lessee of the Crown. In *Attorney General to the Prince of Wales* v. *Crossman* (5) it was held that on an information filed by the Attorney General to the Prince to recover dues payable to the Prince as Duke of Cornwall, the Crown would have a right to allege an interest in the suit and to claim a trial at bar; but Bramwell, B., added that he decided that case on the ground of convenience, and reserved his opinion on the question of the right of the Crown to lay and keep the venue where it would, and it was that expression of reserve which made us desire to consider our judgment in this case.

The Crown can intervene when the cause is one between two subjects, if the Crown alleges that it is interested in the suit. I am inclined to doubt whether the mere assertion of interest would be enough, and I do not wish to express a final opinion on this point. I incline to think that the Court would be entitled to inquire into the nature of the interest alleged, but however that may be, the cases of *Rowe* v. *Brenton* (6), and *Paddock* v. *Forrester* (7), are examples of cases between subjects in which the Crown claimed to be interested, and claimed and had a trial at bar. It has been argued that there is a limit to this right, and that the Crown can only intervene when the cause is one which actually and immediately affects the property, the rights, or the

(1) 2 Stra. 816.
(2) 1 Siderfin, p. 412.
(3) 8 M. & W. 171.
(4) Law Rep. 7 Ex. 177.
(5) Law Rep. 1 Ex. 381.
(6) 8 B. & C. 737.
(7) 1 M. & G. 583.

revenue of the Crown, but such a doctrine is not consistent with *Lord Bellamont's Case* (1), where the Attorney General obtained a trial at bar in an action against the governor of New York for matter done by him as governor, because the King defended it. *Buron* v. *Denman* (2) was an action by a slave-owner against a naval commander for seizing his slaves. The ministers of the Crown adopted and ratified the act of the defendant, and in that case also a trial at Bar was had.

These cases were tried before the Crown Suits Act, 1865, was passed, and that Act has distinctly recognised this privilege or prerogative of the Crown while enacting in s. 46 the provision as to change of venue on which the question in this case arises. The Judicature Acts do not interfere with this right, as was held in *Attorney General* v. *Constable.* (3)

In the present case the action is a personal action, it is one to which the Crown is, as it seems to me, directly a party, because a department of State of which the head is one of her Majesty's ministers is sued for damages for certain acts done by the authority of that department, so that the Crown is in truth a party to the action. This case falls within *Lord Bellamont's Case* (1), and the Crown can intervene because the defendant is a servant of the Crown.

It was also argued that the money to pay any compensation which might be awarded against the Board of Trade in such an action as this would be provided by parliament, and, on the principle laid down in *Reg.* v. *Commissioners of the Treasury* (4), such money is voted as a supply to the Crown, and is the money of the Crown, to be applied by the Crown as directed in the Appropriation Acts. Such money is therefore money belonging to Her Majesty, and this fortifies the conclusion to which I have come. This motion must therefore be granted with costs.

WILLS, J. This is an action brought under the provisions of the 39 & 40 Vict. c. 80, s. 10, against the Secretary of the Board of Trade to recover compensation for the detention, alleged to be without reasonable and probable cause, of a sea-going vessel by

(1) 2 Salk. 625.
(2) 2 Ex. 167.
(3) 4 Ex. D. 172.
(4) Law Rep. 7 Q. B. 387.

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an officer of the Board of Trade acting under s. 6 of the same Act.

The Attorney General, stating that the Crown is interested in the litigation, and that he waives a trial at bar, claims, under the provision of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), s. 46, that the Court shall order the venue to be changed from Newcastle to the city of London as the place in which he elects to have the cause tried.

As by the terms of s. 46 the Attorney-General is entitled to the order he claims in any cause in which the Crown is entitled to demand as of right a trial at bar, the only matter for inquiry is, whether the Crown is so entitled in the present case.

In consequence of a doubt expressed by Bramwell, B., in *Attorney General to the Prince of Wales* v. *Crossman* (1), as to the extent of the rights of the Crown in such a matter we took time to consider our judgment.

The authorities seem to me conclusive, both that where the Crown is interested in litigation, whether civil or criminal, the Attorney General is entitled to demand a trial at bar, and that he is entitled to it on his statement that the Crown is interested, and without more.

Of the right of the Crown to a trial at bar I have no doubt. It has been treated in argument as a branch of the royal prerogative. The right of the Crown to intervene and take upon itself the litigation in which a subject is involved is a branch of the royal prerogative. The right of the Crown when in the position of a plaintiff to a trial at bar is not so, in my opinion, and as clear notions on any question affecting the peculiar rights of the Crown are of great importance, I will presently state my view of the origin and history of the right.

It is said in Chitty's Practice (14th ed. p. 586) to be the right of the Crown in cases in which the Crown is "actually and immediately interested." Adjectives and adverbs are parts of speech which require to be watched, and in my opinion the adverbs here used are misleading.

In *Rowe* v. *Brenton* (2) a trial at bar was granted in a case in which the defendant justified alleged mining trespasses under a

(1) Law Rep. 1 Ex. 381. (2) 8 B. & C. 737.

grant from the Duchy of Cornwall, there being at that time no Prince of Wales, so that the duchy was in the hands of the Crown. The Crown would not have been bound by the judgment between the parties, and was only interested in the sense in which any subject is interested in a decision of the Courts upon points of law or fact which are identical with those which may govern his own rights, either with respect to one of the parties to the suit in question or as to strangers. In *Brown* v. *Lord Granville* (1) a trial at bar was granted on an allegation by the Attorney General that the rights of the King in respect of the duchy of Lancaster would come in question; in *Paddock* v. *Forrester* (2), the defendant justified under grants from the Crown of the right of getting coal, and the Attorney General thereupon came into Court and stated that the Crown was interested in the question. In all these cases, which are not an exhaustive list, but examples of a class of cases in which a trial at bar has been always granted, the interest of the Crown, however substantial, is indirect and not immediate. No private person would be considered "interested" in the litigation so as to make him either a necessary or even a possible party to the contest.

In *Lord Bellamont's Case* (3) the report is very short, and the roll, if it exists in the Record Office, is very difficult to find. The only index to the rolls of this date is an index of defendants, and Lord Bellamont's name is not to be found in it. The records of this period are entered as of the respective terms in which issue was joined, and often many terms before that in which the trial was had. In the reports the case appears as of the term in which the trial took place, and to search for a case under these circumstances is very often futile. I think, however, it sufficiently appears from the short report in Salkeld that Lord Bellamont was sued by someone for some act done by him as governor of New York, and that the Crown undertook his defence upon that ground.

In *Buron* v. *Denman*, reported on points of law in 2 Ex. 167, the defendant was sued for acts done by him as a naval officer in command of one of Her Majesty's ships, and the Crown took upon

(1) 1 Harr. & Woll. 270. (2) 1 M. & G. 583.
(3) 2 Salk. 625.

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itself his defence. A trial at bar was had. I have caused the roll to be inspected to see whether the trial at bar was had on the demand of the Attorney General: but it is incomplete and stops at the award of venire. I believe, however, that there is no doubt the trial at bar was had on the demand of the Attorney General. In *Lord Bellamont's Case* (1) it is stated in the report that such was the fact. In neither of these cases can the interest of the Crown be termed "actual" or "immediate." In *Rex* v. *Hales* (2), which was a prosecution for a misdemeanor, a trial at bar was refused to the Attorney General, applying on behalf of a private prosecutor, but granted on his afterwards stating that the Crown had taken up the prosecution. In *Reg.* v. *Castro* (3), a trial at bar was granted on the demand of the Attorney General prosecuting on behalf of the Crown.

These cases make it abundantly clear that the right to a trial at bar exists when demanded on behalf of the Crown both in cases in which the private rights of the sovereign in respect of the estates and property to which, or to the fruits of which, the sovereign is entitled for the personal use and advantage of the sovereign are in question, and in cases in which the sovereign intervenes in a different capacity, as the head of the state and authorized by the constitution, through the responsible ministers of the Crown, to enforce law and good government and to afford the protection of the state to public officers sued in courts of justice for acts done by them in the discharge of their duties as servants of the Crown. It is clear also that the right applies equally to civil cases and to criminal prosecutions which have been removed by certiorari into the Queen's Bench, and which have so become subject to many of the incidents of civil trials. It would be more accurate to say that the right exists in cases in which the Crown is interested, than to confine it to cases in which the interest of the Crown is actual and immediate.

Probably what the learned writer meant was to exclude cases of ordinary criminal prosecutions in which the Crown is merely the nominal prosecutor, the distinction between which and cases where the prosecution is really that of the Crown, is illustrated

(1) 2 Salk. 625. (2) 2 Stra. 816.

(3) Law Rep. 9 Q. B. 350.

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and emphasized by the two branches of the case of *Rex* v. *Hales* (1), where the trial at bar was refused to the Attorney General as counsel for a private prosecutor, but awarded on his application on behalf of the Crown.

In my opinion it is sufficient for the Attorney General to allege or surmise (in the language of the older cases) that the Crown is interested in the litigation. As a matter of propriety or courtesy he may state his grounds for the allegation; but I do not think he is bound to do so, or that the Court can require it of him. This appears to me to be the result of the authorities. If, however, it were necessary to consider how the Crown is interested in the present action, I think it clear, as I have pointed out, that the right exists where the interest of the Crown is that of protecting the servants of the great departments of state or of conducting such litigation as may be necessary for the efficient conduct of the public administration. The case of *Reg.* v. *Lords Commissioners of the Treasury* (2) shews that in the most correct legal phraseology, the Commissioners of the Treasury, though administering funds whose destination is fixed by Act of Parliament, are servants of the Crown, and not of parliament or the public, nor to be otherwise described than as servants of the Crown.

The same proposition must hold of the persons serving in other public departments.

I proceed to inquire what is the origin of the right in question: and I think it clear that it is in no accurate sense a branch of the royal prerogative, but the survival of a very ancient state of things in which the Crown, in respect of litigation, stood upon the same footing as the subject; the difference between the position of the Crown and the subject in the present day being due simply to the fact that the Crown, not being expressly named or included by necessary implication in the various statutes which have since then modified the rights of the subject in this respect, still retains rights which have been taken away from the subject. That this is so, as regards the right of the Crown to determine the place of trial of an information filed by the Attorney General on behalf of the Crown, is shewn by the learned and interesting judgment of the Court of Exchequer in *Attorney-General* v. *Lord*

(1) 2 Stra. 816. (2) Law Rep. 7 Q. B. 387.

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Churchill (1), where it is laid down that the right to lay the venue where the actor in the litigation chose was once common to Crown and subject; that the right of the subject to keep the venue where it was once laid has been modified by legislation, whereas that of the Crown has not, because the statutes in question do not bind the Crown; and where the alleged prerogative right of the Crown to change the venue at its option was denied, and a rule for that purpose, which had originally been granted absolute in the first instance on the motion of the Attorney General, was, after full argument and time taken to consider the judgment, discharged.

In the same way, trials at bar were anciently had in all causes, whether at the suit of the Crown or of an individual; but by the second statute of Westminster, c. 30, a writ of nisi prius was granted, the effect of which was to deprive the subject of the right to a trial at bar.

In Bacon's Abridgment, title trial (E), it is said "By the statute of second Westminster, c. 30, trials at bar which were before had in all causes, are confined to such causes as by reason of the greatness and variety of the matters in question require a more solemn examination." Again, "The Attorney General may pray a trial at bar in any civil cause wherein the king is interested, for as the statute of nisi prius does not extend to him, the king has a right to try every civil cause in which he is interested at bar." See also Comyns' Digest, title Trials (C a). In *Paddock* v. *Forrester* (2) a trial at bar was ordered on the suggestion of the Attorney General that the Crown was interested in the matter of dispute. Tindal, C.J., said: The Attorney General "has stated that her Majesty does not consent that any writ of nisi prius shall issue in this case. We are therefore bound to direct that the cause shall be tried at bar." In a note to that case the learned editor says: "As the king is not named in the statute of Westminster 2, c. 30, which gives the writ of nisi prius, a nisi prius is not grantable where the king is a party, or where the matter in question in an action between subjects touches the king's right, without a special warrant from the king, or the assent of the Attorney General: 2 Inst. 424; 6 Mod. 247." See also *Rex* v. *Jolliffe* (3).

(1) 8 M. & W. 171, at p. 193. (2) 1 M. & G. 583.
(3) 4 T. R. 285, at pp. 288, 292.

This view of the origin of the right now under consideration is of much historical interest. I am, speaking for myself, convinced that in the early periods of our legal history the sovereign sued exactly as the subject did, by the same writ, "per attornatum suum," just as the subject did, with the same process and the same incidents in all respects. The right of the Crown to bring an action in the ordinary sense of that word, and as distinguished from filing an information, was affirmed in *Bradlaugh* v. *Clarke* (1), and in the course of that case two precedents of such actions were cited from the Year Books of the reign of Henry VI. It was not called to the attention of their Lordships that the Placita de Quo Warranto are full of such actions. The records there set forth, many of them at full length, date from the 6th Edward I. to the 4th Edward III. Some years ago I had occasion to examine them very carefully and, as far as I could, exhaustively with reference to this question, and I am able to say that there are very numerous entries, certainly hundreds, if not more, of records of common actions brought by the sovereign against subjects wholly undistinguishable in the manner of origination, in every stage of procedure, and every other incident connected with it, from an ordinary action between subject and subject, and I found none which indicated any difference in the mode of suit, or incidents of process, or trial between actions by the king and actions by the subject. There are entries of the same character, although from their abbreviated nature less conclusive, in the Abbreviatio Placitorum, which carry the evidence back to the reign of Richard I. The right of the Crown, therefore, to a trial at bar, at all events where the Crown is the complaining party, is in my opinion not a branch of the prerogative, but an interesting and instructive survival in the case of the Crown of a state of things in which at an early period of our legal history the rights of the Crown and subject were identical. The mode in which the Crown can claim a trial at bar on the other hand affords a genuine instance of prerogative right. For the Crown can here do what no subject ever could do. The Attorney General can allege, on his own authority, that the Crown is interested in the subject-matter of the suit, and upon such

(1) 8 App. Cas. 354, at p 375.

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allegation can intervene, and can, having done so, claim the ancient right of both Crown and subject, which for many centuries has been taken away from the subject by legislation. The authorities already cited demonstrate that there it makes no difference to the existence of the right whether the Crown is the complainant, or has taken up the cause of the plaintiff or that of the defendant.

Rule absolute to change the venue.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitor for defendant: *The Solicitor to the Board of Trade.*

R. B. R.

June 24; *Aug.* 9.

[IN THE COURT OF APPEAL.]

PANDORF & CO. *v.* HAMILTON, FRASER, & CO.

Ship—Charterparty—Bill of Lading—Exceptions—"Dangers and Accidents of the Seas"—Damage caused by Rats.

A ship was chartered, and a cargo shipped, under a charterparty and bills of lading which excepted "dangers and accidents of the seas." During the voyage the cargo was damaged by sea-water escaping from a pipe on board the ship, owing to the pipe having been gnawed through by rats.

In an action by the owners of the cargo against the shipowners to recover the amount of the damage so caused:—

Held, that the damage was not within the exception, and the defendants were liable.

APPEAL by the plaintiffs from the judgment of Lopes, L.J.

The action was brought by the shippers of a cargo of rice to recover damages for injury to the rice on board the defendants' ship, during a voyage from Akyab to Liverpool, caused by sea-water passing through a hole in a pipe connected with a bath-room in the vessel, the pipe having been gnawed through by rats.

The excepted perils in the bills of lading were "all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever."

The excepted perils in the charterparty were "the act of God and all and every other dangers and accidents of the seas, rivers, and steam navigation, of whatever nature and kind soever, and errors of navigation during the voyage."

At the trial at Liverpool, it was admitted that all reasonable

precautions had been taken to keep down the rats on the voyage to Akyab.

The following questions were left to the jury:—

"Were the rats that caused the damage brought on board by the shippers in the course of shipping the rice?" and

"Did those on board take reasonable precautions to prevent the rats coming on board during the shipping of the cargo?"

The jury answered the first question in the negative, and the second in the affirmative.

The amount of the damage was settled by agreement.

The case was reserved for further consideration, and afterwards Lopes, L.J., gave judgment for the defendants, holding that the damage was within the exception. (1)

The plaintiffs appealed.

June 24. *Sir Charles Russell, A.G.*, and *Joseph Walton*, for the plaintiffs. The damage to the cargo does not come within the excepted perils, and therefore the plaintiffs are entitled to recover. The proximate cause ought not to be looked to in construing charterparties and bills of lading, but the efficient cause. In this respect there is a difference between these documents and policies of marine insurance: *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2); *Woodley* v. *Michell* (3); *The Xantho.* (4) Here the efficient cause of the damage to the cargo was the action of the rats, just as much as it was in the cases of *Laveroni* v. *Drury* (5) and *Kay* v. *Wheeler* (6), which decide that injury done directly to the cargo by rats does not come within the exception of dangers of the seas. The fact that the rats caused the damage in the present case by letting the water escape into the cargo does not raise any substantial distinction. In *The Chasca* (7), damage to the cargo by sea-water, owing to the act of the crew in boring holes in the ship, was held not to come within the exception of dangers of the seas. The definition of perils of the sea in Story on Bailments, 512a, referred to in the

(1) 16 Q. B. D. 629.
(2) 10 Q. B. D. 521.
(3) 11 Q. B. D. 47.
(4) To be reported.
(5) 8 Ex. 166; 22 L. J. (Ex.) 2.
(6) Law Rep. 2 C. P. 302.
(7) Law Rep. 4 A. & E. 446.

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judgment in the Court below (1), and quoted with approval by Cockburn, C.J., in *Nugent* v. *Smith* (2), would not include the damage in the present case.

Bigham, Q.C., and *J. G. Barnes*, for the defendants. The damage to the cargo comes within the exception of "dangers and accidents of the seas," for the findings of the jury shew that it could not have been prevented by the exercise of any reasonable skill or diligence on the part of the shipowners: *Woodley* v. *Michell* (3); *Buller* v. *Fisher* (4). Damage by sea-water, occurring at sea, is caused by a danger of the sea, and not the less so because it would not have occurred but for the action of the rats. If the water is the efficient cause of the damage, the case falls within the exception, although something else may be a causa sine quâ non: *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (5) The damage was caused by a danger of navigation: *Laurie* v. *Douglas.* (6)

Joseph Walton, in reply, referred to *McArthur* v. *Sears* (7); *Cullen* v. *Butler.* (8)

Cur. adv. vult.

Aug. 9. LORD ESHER, M.R. This case is one of considerable importance.

The action is brought by the charterers of a ship, who are also the holders of bills of lading, for damage done by sea-water to a cargo of rice shipped by them and belonging to them. The case was tried before Lopes, L.J., first of all with a jury, and after certain questions had been left to the jury, and been answered by them, by himself without a jury. His judgment has been given in favour of the defendants on the ground that the damage done to the rice was the result of causes excepted in the charterparty and the bills of lading.

The questions raised, therefore, are, what is the true construction of the charterparty, and the bills of lading, which are in this case identical, and what is the reasonable mode of applying that

(1) 16 Q. B. D. at p. 635.
(2) 1 C. P. D. at p. 437.
(3) 11 Q. B. D. 47.
(4) 3 Esp. 67.
(5) 6 Q. B. D. 51.
(6) 15 M. & W. 746.
(7) 21 Wendell (New York), 190.
(8) 5 M. & S. 461.

construction to the facts of this case? In the charterparty and the bills of lading the exceptions are, "The act of God and the Queen's enemies and all and every other dangers and accidents of the seas, rivers and steam navigation, of whatsoever nature or kind, and errors of navigation during the voyage." The vessel was chartered by the plaintiffs to proceed to Akyab, and there load a cargo of rice, and the rice was loaded under the charterparty and bills of lading were given in the same terms as the charterparty. Therefore the rice was shipped under the charterparty, and under the bills of lading at Akyab. During the voyage home to Liverpool, rats gnawed through a pipe communicating with a cistern in the ship, and thereby let in the sea-water, which damaged the rice.

There was a dispute at the trial as to whether the rats had been allowed to come on board by the shippers in the course of shipping the rice at Akyab; this question was left to the jury. Another question was put to the jury,—"Did those on board take reasonable precautions to prevent the rats coming on board during the shipping of the cargo?" That also was at Akyab. The jury answered the first question in the negative,—that is, that the rats were not brought on board. The second question they answered in the affirmative, namely, that those on board did take reasonable precautions to prevent the rats coming on board during the shipping of the cargo. The learned judge states that at the trial at Liverpool there was no dispute about the cause of the damage to the cargo; it was agreed that the damage was caused during the voyage by sea-water passing through a hole in a pipe connected with a bath-room in the vessel, such pipe being eaten through by rats. Therefore, the cause of damage to the rice is, that rats ate through the pipe, thereby letting the water in. The question is, whether on the true construction of the charterparty and the bills of lading, and applying it in the legal way to the facts, the cause of the damage is a peril excepted out of the bills of lading and charterparty.

Now charterparties, bills of lading, and policies of marine insurance are documents which do not materially differ from an ordinary daily form of each. As mercantile business has been enlarged they have differed from time to time, but they do not

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differ from day to day, and in their substantial structure, which is very peculiar, they are much the same as they have been from the beginning. Where documents are in daily use in mercantile affairs, without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago, and which has from that time been accepted in the Courts of Law, and in the mercantile world, should not be in the least altered, because all subsequent contracts have been made on the faith of the decisions. Therefore, whether one thinks that one would oneself have come to the same conclusion as the judges did in the beginning is immaterial. One ought to adhere strictly to the construction which has been put upon such documents.

Moreover, if those documents, construed as the judges have construed them for many years, have also for many years been applied in a particular way to facts similar to those which are in question at this day in a cause, it is equally material in my opinion to adhere to that application, or else mercantile business becomes wholly uncertain.

Now with regard to charterparties, bills of lading, and policies of marine insurance, there have been certain rules of construction determined upon and accepted, and there has been a distinction as to the mode of construing the first two documents and the third. With regard to policies of marine insurance a very strict rule as to the application of the doctrine of causa proxima has been adopted. It was pointed out long ago that if this doctrine of causa proxima, as against causa remota, is taken in a large sense it is equally applicable to charterparties, bills of lading, and policies of marine insurance. One would not seek either as to a charterparty or a bill of lading a cause in the one sense remote, but with regard to policies of insurance the doctrine of causa proxima, or the immediate cause, has been much more strictly applied than in the other two cases; and the difference of construction has been that in a policy of marine insurance one looks strictly only to the causa proxima or immediate cause; whereas in the others one looks to that which is called in the law books the causa causans, which has been interpreted by judges to mean the real effective cause of the damage. All these docu-

ments, as I have said, were constructed originally in a very peculiar elliptical form of mercantile language. The statement that the shipowner will deliver the cargo in the same order as he has received it, excepting the act of God and so on, and all and every other dangers and perils of the seas, shews that it is a most extraordinary elliptical form. The exceptions do not describe the damage, although if the document were construed only grammatically they would be rather supposed to describe the damage; they describe the cause of the damage, not the damage. It is necessary, therefore, to see whether the cause of the damage is one which is excepted.

The first cause which may produce the damage is the act of God, as it was called in the old times. I shall not now enter into a discussion, which at one time was rather rife, as to what was the exact meaning of the term "the act of God." In the older, simpler days I have myself never had any doubt but that it did not mean the act of God in the ecclesiastical and biblical sense, according to which almost everything is said to be the act of God, but that in a mercantile sense it meant an extraordinary circumstance which could not be foreseen, and which could not be guarded against. But in this case there cannot possibly be any foundation for any such suggestion as that this gnawing of a pipe by rats and letting in sea-water is, within the terms of the bills of lading and charterparty, the act of God. The real question is whether the cause here could be said to be a cause brought about by dangers and accidents of the seas. It obviously was not a danger or accident of steam navigation or an error of navigation. Therefore the only term in the bills of lading and charterparty under which the cause could be brought, if it is a cause, is dangers or accidents of the seas.

Now it has been long ago held, that these words "dangers of the seas" are really the same as perils of the seas, for perils and dangers in the English language are synonymous words. Therefore the question is, whether this is a peril of the sea? That depends on the meaning of the term "perils of the seas" in charterparties, bills of lading, and policies of insurance. They really are the perils to which people who carry on their business on that dangerous element the sea are liable, because they carry on their business on the sea. They are the perils of the sea, not the perils

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of journeying. In Arnould on Marine Insurance, Book II. chap. II., it is stated that "the words 'perils of the sea' only extend to cover losses really caused by sea damage, or the violence of the elements, 'ex marinæ tempestatis discrimine.' They do not embrace all losses happening upon the seas." (1) There may be many dangers which come under other words, but which do not come under the words "perils of the seas." If perils of the seas had really included all losses happening on the sea it is obvious that none of the subsequent words, which have been added to charterparties, bills of lading, and policies of insurance, would have been wanted, or would have been included in them. Therefore perils of the seas are those which are peculiar to carrying on business on the sea. They obviously therefore include the violence of the sea itself. They include the danger which is caused to things being on the sea by reason of the action of other elements which act upon the sea.

But rats do not come from the sea. They are not generated by the sea. They are no more a difficulty on board ship than in a warehouse or a mill. Therefore à priori one would have said that damage done to the ship or cargo on board the ship by rats could not be a peril of the seas, as construed from the beginning. The first time a similar question was raised (in *Rohl* v. *Parr* (2)) that was done which in the old days judges were in the habit of doing much more than judges have been in the habit of doing lately. It was at a time before the distinction was so strictly drawn between the construction of a mercantile document being for the Court and not for the jury, and the question being partly for the Court and partly for the jury. Lord Kenyon asked a mercantile jury at Guildhall whether in the mercantile world damage to the ship's bottom by worms was treated as a peril of the sea. The jury answered that it was not. Thereupon Lord Kenyon having asked for that opinion of the jury, not as decisive, but in order to instruct him, held that, upon the true construction of the policy, damage done to the ship by worms was not within the term "perils of the sea," and that decision, which he, having had himself instructed by the jury, held as a matter of law, has been adopted from that time to this.

My Brother Lopes, in his judgment in the present case, which

(1) Vol. ii. p. 741, 5th Ed. (2) 1 Esp. 445.

is most elaborate and careful, has not controverted that view: he has adopted the view that damage to the ship or cargo by rats of itself is not a damage caused by a peril or danger of the seas.

It is hardly necessary to go through the cases, but I think it is better to name some of them to shew how clear this has been. The case of *Rohl* v. *Parr* (1), which was on a policy of insurance on the ship, shews it very strongly. The ship sailed from St. Bartholomew, and arrived safely on the coast of Africa, and began to trade. Afterwards, being about to return, it was found that the worms had eaten her bottom, and had destroyed it so effectually that the ship could barely get to Cape Coast, where she was condemned as irreparable. This case seems to me very strong. The worms had eaten the bottom of the ship—no doubt it was a wooden ship in those days—so as to render her unfit to be on the seas, so that it was wrong to continue the voyage, and so that it was right and proper to take her into a port of distress, where, if what had happened was caused by the perils of the sea, she was from the other circumstances a constructive total loss, yet it was held that this eating by the worms was not, even in a policy of insurance, a damage caused by a peril insured against—that is by a peril of the sea. The damage in that case was done by worms, but the result must have been the same if it had been done by rats. It would have been no stronger if it had been done by rats from the inside. If rats ate a wooden ship from the inside nearly through to the outside of her planks, so that she became wholly unfit and unsafe to keep the seas, and she were carried into a port, where her condition was such that she could not be repaired so as to be a sea-going ship, in the ordinary business sense of being capable of repair, that would not be loss caused by a peril of the sea.

The next proposition which I shall lay down is that in business if it is attempted to distinguish with extreme fineness either as to construction or as to application to facts the possibility of real business is destroyed, and it seems to me impossible to hold with anything like a business sense of responsibility that if rats eat within the eighth of an inch of the outside of the planks and so make a ship unfit to keep on the seas and render her irrepar-

(1) 1 Esp. 445.

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able, that constructive total loss is not a loss caused by perils of the sea, yet if the rats were to eat the eighth of an inch further it would be a loss by perils of the sea. That is far too fine for me, and I think far too fine for business.

If that case, therefore, is carried to its full length, the damage caused by the eating by rats however immediate is not even in a policy of insurance a peril of the seas within the meaning of the policy, and much more, as I shall presently shew, is this so in a charterparty or a bill of lading.

There is a case with regard to rats—*Hunter* v. *Potts* (1)—before Lord Ellenborough, which was again on a policy of insurance. The ship having touched at Antigua was detained there a considerable time by the sickness of the crew, and while she lay at that island the rats ate holes in her transums and other parts of her bottom. In consequence a survey was called, and the ship was found to be unfit to proceed to Honduras, and she was therefore condemned and the cargo sold. Here was a ship reduced to extremities, unfit to keep the sea and properly sold, but the loss having been charged as caused by a peril of the sea, Lord Ellenborough was clearly of opinion that it was not a loss within any of the perils insured against. That, again, was the case of a policy of insurance.

One would expect to find in America the same law as in England, because the American people of business have adopted the same forms of bills of lading and of policies and of charterparties that we have ourselves. In the case of *Hazard's Administrator* v. *New England Marine Insurance Company* (2) the damage was caused by worms. The judge directed the jury that "if they should find that in the Pacific Ocean worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." I quote this case because the Court there adopt the English decision to which I have referred. They say: "In 1796 the case of *Rohl* v. *Parr* (3) was tried, which involved this question, before Lord Kenyon and a special jury. His Lordship said that 'it appeared to him a question of fact rather than of law, such as the jury were competent

(1) 4 Camp. 203.

(2) 8 Peters, 557.

(3) 1 Esp. 445.

to decide on from the opinion on the subject adopted by the underwriters and merchants.' And, 'the jury found it was not a loss within the term 'perils of the sea' in policies of insurance, and, of course, that the plaintiff could not recover for a total loss.' There seems to have been a general acquiescence in this decision in England, as it has never been overruled." (1) Then some other cases are cited, and it is said that in America the Courts have adopted that finding of the English jury, and acted upon it.

I should like to notice this point, which is raised by that last case. There the question left to the jury was whether in the Pacific Ocean it was ordinary that worms should appear.

It seems to me that there must be a distinction between rats and some worms which attacked ships in the old days at sea. If by worms are meant worms which ate through the ship from the outside, those are worms which are generated by the sea and which attack from the outside, and this would immediately, I think, raise the question which was left to the jury in that case. Therefore the real ground why the loss was not held to come within the term "perils of the sea" was this, that if the circumstances were the ordinary circumstances of the voyage insured then the loss was not within the terms of the policy. Then it would come within the ordinary circumstances, not the extraordinary circumstances, of the voyage. Therefore to my mind it is different in a case of seaworms—worms which are peculiar to the sea—attacking the ship from the sea, which I think would be a peril of the sea, unless it were that it is an ordinary circumstance of the voyage, which either the underwriter, or the shipowner, or the owner of the cargo, ought to anticipate as an ordinary circumstance of the voyage. That question with regard to the attack of worms or barnacles can hardly arise in later days, because it was a danger to wooden ships which were not metalled. The metalling of ships was invented and applied chiefly in order to guard against that very danger, and now if a ship were sent into seas which are frequented by such worms without being metalled it would be a very strong circumstance upon which a jury would, I think, find that the ship was not seaworthy for that voyage even when she started, it being known at the time that in the

(1) 8 Peters, at pp. 583, 584.

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ordinary course of the voyage this danger must be anticipated. But with regard to rats it stood from the beginning, as I say, subject to the other view that a danger to the ship or cargo by rats was not caused by an excepted peril in the bill of lading or by a sea peril as insured against in the policy. Coming to later times, there is the case of *Laveroni* v. *Drury* (1), which, to a certain extent, is decisive in my opinion. There the question arose upon bills of lading. The cargo, which was cheese, a thing most liable to the attacks of rats, was damaged by rats. It is true that the sea-water did not come in. The only damage was the damage by the rats themselves. Pollock, C.B., said: "We agree with the learned judge, that the true question is whether damage by rats falls within the exception, and we are clearly of opinion that it does not. The only part of the exception under which it possibly could be contended to fall is as 'a danger or accident of the sea and navigation,' but this we think includes only a danger of the sea or navigation properly so-called, namely, one caused by the violence of the winds and waves [a vis major] acting upon a seaworthy and substantial ship, and does not cover damage by rats, which is a kind of destruction not peculiar to the sea, or navigation, or arising directly from it, but one to which such a commodity as cheese"—(this is also true as to rice)—"is equally liable in a warehouse on land as in a ship at sea." With regard to the observations made in the old days about a cat being on board, it was characteristic of the refined minds of those times to deal with such a matter. Pollock, C.B., who was a very practical judge, said he did not think much of the case of cats, because from the way in which cargoes are now stowed it would be very difficult for a cat to make its way in amongst the cargo; and so it would. However that question of the cats was dropped long ago, as is well known.

That case is a distinct decision that damage done to a cargo by rats, where it does not let in sea-water, is not damage caused by perils of the sea. I have dealt with the cases as to damage to the ship by rats or worms under a policy of insurance. Now I come to the case of damage to a ship or a cargo under the exception in a bill of lading, or a charterparty. In the case of a bill

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.

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of lading or charterparty, not the last immediate cause, but the real effective cause, is to be looked to, so that it must come to this, if the rats, as I said before, eat within the eighth of an inch of the outside of the planks of the ship and so damage the ship, or if rats eat the cargo, or otherwise damage the cargo, this conduct of the rats is not a cause of damage which is excepted, yet if the rats go a little further and let the sea-water in, then the damage to the cargo is to be excepted. It is impossible, and it cannot be in my mind, that there are such distinctions. Therefore I take the case of *Laveroni* v. *Drury* (1) to be decisive, not only of what had then to be decided, namely, that damage caused by rats is not damage caused by a peril of the sea, but also, as a necessary consequence, to prove this, that if rats gnaw through a pipe and let the water in, nevertheless, as the rats are the cause, and the sea is not, and the letting in of the sea-water is only an effect of the cause, the real effective cause being the rats, what the rats do is not damage caused by perils of the sea.

I think myself the cases would make it doubtful, even in a policy of insurance, whether it ought not to be held that where rats gnaw through the planks of the ship, the act is so closely immediate that the coming in of the sea-water should be treated, not as a cause at all, but as an effect, so that even in that case there would be causa proxima as well as causa causans; but this is a matter which we need not determine on the present occasion, and which must remain open until the point is raised.

Taking the distinction of construction which has always been applied as between charterparties, bills of lading, and policies of insurance, I feel in my own mind perfectly clear that where the effective cause is the conduct of rats, as the learned judge has found here in terms, and properly found, it cannot be held that the coming in of the sea-water is the cause.

Therefore, with the greatest deference, I cannot agree with the judgment of my Brother Lopes. I have read his judgment with the utmost care, and I think he has in reality, although he did not mean to do it, acted upon this: "The *immediate* cause of damage in this case," he says, "was the incursion of salt water through the hole in the pipe eaten through by the rats; the

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.

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effective cause of damage was the rat or rats." (1) Therefore it seems to me that he has inadvertently applied to this case the strictest rule of the causa proxima, which is only applicable to policies of insurance, and is not applicable to bills of lading or charterparties. In my opinion it has been held from the beginning that in a bill of lading or in a charterparty the effective cause is to be looked to, and not the immediate cause, in the sense of its being the causa proxima, as in the case of a policy of insurance. That is the defect in the careful and elaborate judgment which he has given.

For the purpose of regularity in business, and in order that people may know what their liabilities are, and what they are undertaking, it seems to me that we must revert back to the old rule, and say that where the effective cause of a loss under a charterparty or a bill of lading is the damage to the cargo by rats that is not a peril excepted, and where the rats, by being the effective cause, let in the sea, this letting in of the sea is not a cause at all. It is the effect of what was done by the rats, and the rats were the effective cause.

I cannot therefore agree with the judgment, and I am of opinion that it must be overruled.

BOWEN, L.J. The judgment I am about to read is the judgment of my Brother Fry and myself.

This was an action brought against the owners of a ship to recover damages for sea injury to the cargo caused by a leakage of which rats were the authors. The defendants' ship had been chartered by the plaintiffs to proceed to Akyab and there load a cargo of rice for Liverpool. The excepted perils in the charterparty were the act of God, and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatsoever nature and kind and errors of navigation during the voyage, and the tenor of the bills of lading was the same. It appeared that the damage was caused during the voyage to Liverpool, after the ship had left Akyab, by sea-water passing through a hole in a metal pipe connected with a bathroom in the vessel, this pipe having been gnawed through by rats.

(1) 16 Q. B. D. at p. 633.

It was not disputed at the trial that all reasonable precautions had been taken by the captain and his crew to keep down the rats on the voyage from Liverpool to Akyab. The jury found further that the rats which caused the damage were not brought on board by the shippers in the course of shipping the rice at Akyab, and that those on board had taken reasonable precautions to prevent the rats coming on board at Akyab during the shipping of the cargo. There was on the other hand no finding of the jury, and no admission by the parties, as to the condition of the vessel in respect of rats when she left Liverpool for Akyab, or as to the original cause of the presence of rats on board the ship.

The case was dealt with by Lopes, L.J., on further consideration, and he directed a verdict for the defendants, on the ground that the case was one of danger or accident of the seas within the exception in the shipping documents, and that the shipowners were thereby exonerated. From this judgment the plaintiffs now appeal.

That damage done to cargo by the direct action of rats, which devour it on the voyage, is not due to a peril of the sea, was decided in *Kay* v. *Wheeler* (1) by the Exchequer Chamber; (see *Laveroni* v. *Drury* (2), and *Aymar* v. *Astor*. (3)) It was contended, however, in the present case, on behalf of the shipowners, that the question is a different one where cargo is directly damaged by sea-water entering a ship through leaks which rats have caused, and that although the shipowner is not excused when the rats eat a cargo of rice directly—if a rat eats through a pipe which lets the sea-water in upon the rice, the accident is one for which the shipowner will not be responsible—a distinction which, if it exists, must be admitted to savour of subtlety. By the common law of this country, which in this respect is stricter than either the civil law or the law of many continental nations, a carrier by sea was liable for loss or damage to goods, except only in the event of accidents caused by the act of God or of the king's enemies. In *Dale* v. *Hall* (4), the loss was occa-

(1) Law Rep. 2 C. P. 302.
(2) 8 Ex. 166; 22 L. J. (Ex.) 2.
(3) 6 Cowen's Reports, Supreme Court of New York, p. 266.
(4) 1 Wils. 281.

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sioned by a leakage caused by rats gnawing a hole in the bottom of the vessel. The goods were not carried under any bill of lading, and it was held that by the common law the hoyman was not excused on the ground of any act of God. The larger exception to the carrier's liability contained in the exception of perils of the seas or accidents and dangers of the seas has sprung up gradually since the reign of Queen Elizabeth, no such provision being found in the forms of charterparties or of bills of lading given in West's Symboleographie, but being known apparently in the reign of Charles I. (see *Pickering* v. *Barkley* (1), *Mors* v. *Slew* (2), and *Barton* v. *Wolliford*. (3)) The cargo in the present case was carried under a bill of lading containing the now familiar exception, and we have to consider accordingly whether a carrier who would not be excused by the common law for loss due to leakage caused by rats, can find protection under the express term "accident or danger of the sea."

The exact definition of the term "dangers or accidents of the sea," or of the cognate expression "perils" of the sea, which latter name is only the Latinised equivalent for "dangers," has been the subject of perpetual discussion both in England and America. On the one side it has been sought to confine it to calamities which occur only through the violence of the elements (ex marinæ tempestatis discrimine), or (to use the language of Marshall, vol. ii. p. 487, Part I. cap. xii. s. 1), "such as arise from stress of weather, winds, and waves, from lightning and tempests, rocks and sands," &c. By others it has been sought to extend it so as to include all inevitable accidents which occur upon the seas, or at all events all such as occur by the action of sea-water in the course of navigation, for which human negligence, or for which at all events the carrier's negligence, is not responsible. The term "peril of the sea" is one which has long been employed in policies of insurance as well as in contracts of carriage, though losses which fall within the meaning of the policy (owing to the different nature of the contract) are not always losses which would fall within the bill of lading exception. But it may be at least considered probable (subject always to any question of usage or construction) that if a loss is *not* due

(1) Style, 132. (2) 3 Keb. at p. 73. (3) Comb. 56

to a peril of the sea within the meaning of a policy of insurance, neither will it be due to a peril of the sea within the meaning of the ordinary bill of lading. According to Lord Tenterden the decision of the judge upon what is a peril of the sea may be guided by usage and the course of practice among merchants, and it is observable that the case in which pirates were first held to be a peril of the sea was decided upon a certificate of merchants, read in court, that they were so esteemed (Style, 132). It is not necessary in the present instance, and not being necessary it would be undesirable, to lay down an exhaustive definition as to the meaning of the term "perils of the sea," either in contracts of carriage or in policies of insurance. We desire to leave ourselves entirely free to consider (whenever the necessary occasion arises) whether the term "perils of the sea" may not embrace other dangers beyond those which are due directly to the violent action of the elements. Unless there be some exception to such a definition it is difficult to account for the fact that pirates by mercantile custom are a peril of the sea, or that shipwreck upon a hidden boulder, when not due to the negligence of the master, would be due to the same excepted cause.

It is sufficient to affirm broadly that within the meaning of an ordinary charterparty or bill of lading a loss cannot be due to the perils of the sea which the exercise of reasonable skill and diligence on the part of the shipowner might have averted. In the case of *The Schooner Reeside* (A.D. 1837) (1), Story, J., thus expresses himself: "The phrase 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar *to* that element, or whether understood in its more extended sense, as including inevitable accidents *upon* that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." So again in Marshall on Insurance, vol. i. p. 234, Part I., cap. vii. s. 4: "If any loss or damage happen to the goods, from any fault or defect of the ship (not arising from sea damage, or from any accident or misfortune in the voyage,

(1) 2 Sumner, at p. 571.

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but from some latent defect before she sailed), the owner of the goods has his remedy against the owners of the ship for such loss or damage." The judgment of Lopes, L.J., in the Court below accepts this principle, but proceeds upon the basis that the action of the rats in gnawing through the pipe and letting in the sea-water upon the cargo was a matter beyond all human control—that it was, to adopt his own words, a case "of sea damage at sea and nobody's fault." The burden of proof of this rested upon the shipowner, but the admission made during the trial of the case and the finding of the jury seem to us to fall far short of establishing the inference drawn by Lopes, L.J. It is consistent with both the verdict and the findings that the presence of rats may have constituted an original vice in the ship when she sailed to take in cargo, which continued down to and at the time when she in fact took it in. Their presence at such a time—so far as their presence constituted any element of danger to the cargo—was to that extent a defect in the ship. Even if it were shewn to be impossible to have excluded the rats which caused the mischief to the pipe—a topic which it may be said we have not the materials before us for discussing exhaustively—it would still we think be doubtful whether a ship with rats on board her that receives goods into her hold ought not to bear the responsibility for all damage done to the goods by the rats.

The burden, as we have said, rests upon the shipowner. An owner of cargo has no means of knowing what has been done by the ship in respect of rats or what is the condition of the vessel. He has a right to assume that the ship is reasonably fit for the carriage of his goods. The broad inference of fact which most persons would accordingly be inclined to draw is that rats capable of doing substantial mischief to a ship or cargo, and which do not come on board with the cargo itself, are not the kind of inevitable misfortune which happens to ships fit to carry cargo,—that a rat and all the direct or indirect mischief a rat does is, in other words, a peril of the ship and not a peril of the sea. Sir William Jones (Essay on the Law of Bailments, p. 105), commenting upon the case of *Dale* v. *Hall* (1), in which the rats

(1) 1 Wils. 281.

had gnawed out the oakum and made a small hole through which the water gushed, says that it must have been at least ordinary negligence to let a rat do such mischief in a vessel, and quotes the Digest (19, 2, 13, 6): "Si fullo vestimenta polienda acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere." The Court of Exchequer in *Laveroni* v. *Drury* (1) seem to have been of the same opinion. Speaking of a passage from Roccus, which states that keeping cats on board excused the shipowner from damage by rats, Pollock, C.B., says: "Whatever might have been the case when Roccus wrote, we cannot but think that rats might be now banished from a ship by no very extraordinary degree of diligence on the part of the master." (2) It is not impossible that it was on some such broad common-sense view of the case that Lord Ellenborough proceeded when in *Hunter* v. *Potts* (3) he held that a loss arising from rats eating holes in the ship's bottom is not within the perils insured against by the common form of a policy of insurance. As a rule, rats can be kept out of ships which are fit to carry cargo, and speaking broadly, a loss which is due to leakage caused by rats will probably be found to be due not to the perils of the sea, but to the defects of the ship or the want of precautions of the shipowner. In his chapter dealing with policies of insurance, the learned author of Kent's Commentaries says: "It has even been a vexed question whether the damage done to a ship by rats was among the casualties comprehended under perils of the sea, and the authorities are much divided on the question. The better opinion would, however, seem to be that the insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity": vol. iii. pp. 300, 301. He adds in a note some references to a number of foreign juridical writers, who have all maintained the principle that the owner, and not the insurer, is liable for an injury by rats, and states that the only case which he has met with directly to the contrary is that of *Garrigues* v. *Coxe*. (4) Story on Bailments, s. 513, adds: that "it seems that a loss occasioned by a leakage

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.
(2) 8 Ex. at p. 172.
(3) 4 Camp. 203.
(4) 1 Binney, 592.

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which is caused by rats gnawing a hole in the bottom of the vessel is not in the English law deemed a loss by a peril of the sea." Lord Tenterden in his work on Shipping, part IV. cap. 5, s. 4, adopts language to the same effect: "Where rats," he says, "occasioned a leak in the vessel, whereby the goods were spoiled, the master was held responsible for the damage notwithstanding the crew afterwards, by pumping, &c., did all they could to preserve the cargo from injury. And this determination agrees with the rule laid down by Roccus, who says: 'If mice eat the cargo and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault. Yet if he had cats on board his ship he shall be excused.' This rule and the exception to it, although bearing somewhat of a ludicrous air, furnish a good illustration of the general principle, by which the master and owners are held responsible for every injury that might have been prevented by human foresight or care. In conformity to which principle, they are responsible for goods stolen or embezzled on board the ship by the crew or other persons, or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners."

It is not strictly necessary to decide what would be the result in the somewhat improbable case of a shipowner who succeeded in proving that the presence of rats that have caused mischief by leakage to the cargo, was neither due to any defect in the reasonable condition of his ship nor a matter which by reasonable precautions could have been prevented. This hypothetical case of a possible exception to what we may call the broad and natural inference of fact is reserved by Marshall, vol. i., p. 235, part I., cap. vii. sec. 4, where he says that the owners are liable for damage done by rats, unless it appear that all necessary precautions were used to prevent it. The academical question which Marshall and other writers have left open it is not necessary in the present case to close, so far as relates to leakage caused by rats as distinguished from damage done by them to the cargo directly.

It is, however, obvious that the continental writers to whom Story refers as entertaining a view that in such a case the owner

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would be protected, wrote at a time when ships were very different from the carrying ships of the present day, nor indeed were their views followed by the Court of Exchequer in *Laveroni* v. *Drury* (1), or by the Exchequer Chamber in *Kay* v. *Wheeler*. (2) It never must be forgotten that the English law is less indulgent to the carrier than either the Roman law or the law of many continental nations. In the present instance—the burden of proof resting with the shipowner—no facts have been established which raise this speculative point. It was consistent with all the findings that the mischief done to the pipe and the incursion of seawater which followed would never have happened but for either a defect in the condition of the ship or some want of providence in the shipowner or his servants. The question therefore does not arise whether there may not be a conceivable case of leakage caused by rats which would not fall within the broad and everyday rule.

For these reasons we are of opinion that the judgment of the Court below must be reversed, and the appeal allowed with costs.

Appeal allowed. Judgment for the plaintiffs.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) 8 Ex. 166; 22 L. J. (Ex.) 2. (2) Law Rep. 2 C. P. 302.

P. B. H.

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Aug. 6, 7.

[IN THE COURT OF APPEAL.]

EX PARTE HUBBARD. IN RE HARDWICK.

Bill of Sale—Validity—Pledge of Goods—Delivery to Pledgee—Document containing Terms of Pledge—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9.

Where goods are pledged as security for a loan and delivered to the pledgee, a document signed by the pledgor, recording the transaction and regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale within the Bills of Sale Act, 1882, and is therefore not liable to be avoided under s. 9 for deviating from the prescribed form.

Ex parte Parsons (16 Q. B. D. 532) explained.

APPEAL against an order of the Queen's Bench Division Pollock, B., and Cave, J.), affirming an order of the judge of the Lewes County Court, made on the application of the official receiver of the Court as trustee in the bankruptcy of E. J. Hardwick, by which it was declared that certain agreements, made between the bankrupt and Walter Hubbard, were void as against the trustee, and that five tricycles and one bicycle, referred to in the agreements, which were in the possession of Hubbard, were the property of the trustee, and Hubbard was ordered to deliver them up.

On the 14th of November, 1885, the bankrupt borrowed of Hubbard 20*l.*, and agreed to repay that sum, together with 5*l.* for interest and expenses, on the 14th of March, 1886, and, by way of security for the payment of those sums, he then and there deposited with Hubbard two of the tricycles, and they remained in the actual possession of Hubbard until the bankruptcy.

The following document was at the same time signed by the bankrupt:—

"An agreement made the 14th of November, 1885, between E. J. Hardwick, of the one part, and Walter Hubbard, of the other part, whereby the said Hardwick, having this day deposited at his risk with the said Hubbard the goods comprised in the schedule hereunder written, as security for the payment of the sum of 20*l.* paid by the said Hubbard to the said Hardwick this day (the receipt whereof the said E. J. Hardwick hereby acknow-

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ledges), and of the sum of 5*l.* for interest and expenses, doth hereby agree to pay to the said Hubbard the said sums of 20*l.* and 5*l.* on the 14th of March, 1886. And it is further agreed that, in case of default in payment, the said Hubbard, after three days' notice in writing delivered at the last known address of the said Hardwick, may sell the said goods by auction or otherwise, and apply the proceeds of sale in or towards the payment of any money which may be due under this agreement, and of the expenses of sale, but, until such default is made, no such sale is to take place, nor is any action or suit to be brought to enforce payment of the said sum of 20*l.* and interest. And the said Hardwick hereby agrees that, if the goods be sold, and do not realize sufficient to pay the amount then due under this agreement, and the costs, he will forthwith pay to the said Hubbard whatever sum may remain owing on this agreement, with interest thereon until such payment, at the rate of 5 per cent. per month. And if payment shall not be made of the said sums of 20*l.* and 5*l.* on the day hereinbefore appointed, the said Hardwick agrees to pay interest thereon until payment, at the rate of 5 per cent. per month. And the said Hardwick hereby agrees to forthwith pay to the said Walter Hubbard such sum or sums as he may pay for any insurance he may effect on the goods comprised in the said schedule, with interest thereon at the rate hereinbefore mentioned."

The schedule comprised the two tricycles.

On the 2nd of December, 1885, the bankrupt borrowed a further sum of 10*l.* 1*s.* from Hubbard, depositing with him by way of security a bicycle, and he signed the following document, dated the 2nd of December: "In consideration of 10*l.* 1*s.* paid me this day by Walter Hubbard (receipt of which I hereby acknowledge), I hereby agree to repay the same, together with 10*s.* for interest, on the 16th of December, 1885, and interest thereon after that day at the rate of 60 per cent. per annum. And, for securing payment of the aforesaid sum and interest, I deposit a Rudge bicycle, and hereby empower and authorize you to sell the same in any manner you think proper, if the aforesaid sums are not paid on the 16th of December, 1885."

On the 15th of January, 1886, the bankrupt borrowed of

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Hubbard a further sum of 15*l.* on similar terms, depositing with him at the same time as security two more tricycles. He also signed a document similar in form to that of the 14th of November, 1885, the document containing a statement that the bankrupt had "this day deposited" the two tricycles with Hubbard.

On the 7th of February, 1886, the bankrupt borrowed of Hubbard a further sum of 13*l.* 10*s.* on similar terms, depositing with him at the same time as security another tricycle, and signing the following document, dated the 7th of February:—

"I deposit with W. Hubbard a tricycle to secure 13*l.* 10*s.*, to be paid on the 6th of April, 1886, and if not paid you have this authority to sell it in the manner you like best."

None of the moneys secured by these deposits had been paid by the bankrupt before the bankruptcy.

On the 22nd of February, 1886, a receiving order was made against Hardwick, and on the 2nd of March he was adjudicated a bankrupt.

The county court judge was of opinion that the case was governed by the ratio decidendi of the Court of Appeal in *Ex parte Parsons* (1); that the four agreements were bills of sale within the Bills of Sale Acts of 1878 and 1882; and that they were void under s. 9 of the latter Act, because they were not in the form given in the schedule to the Act.

Hubbard appealed to the Queen's Bench Division.

Alfred Cock, Q.C., and *Duke*, for the appellant.

Muir Mackenzie, for the official receiver.

The Queen's Bench Division (Pollock, B., and Cave, J.) were disposed to think that the Bills of Sale Acts did not apply to the transaction, but, by reason of the judgments of the Court of Appeal in *Ex parte Parsons* (1) they considered that they were bound to hold that the Acts did apply. They therefore affirmed the decision of the county court, but gave leave to appeal.

Hubbard appealed.

Alfred Cock, Q.C., and *Duke*, (*C. C. Scott*, with them), for the appellant. The Bills of Sale Acts do not apply. The transaction was in substance a pawn or pledge. The goods were deposited

(1) 16 Q. B. D. 532.

with the lender of the money before the execution of the documents. The documents are not within the Bills of Sale Act of 1882, unless they are within the definition of a "bill of sale" contained in s. 4 of the Act of 1878. (1) They are not bills of sale in the ordinary sense of the term, and they do not come within any part of the definition in s. 4. The possession of the goods was handed over to the pledgee in accordance with the agreement of pledge, which was antecedent to the documents; the documents did not give any right to the possession. They only record the previous transaction of pledge, and define the circumstances under which the power of sale, which the pledgee has by virtue of the pledge, is to be exercised. The Acts do not apply to any transaction in which actual possession of the goods is delivered to the grantee or pledgee at the time; the Acts apply only to cases in which the property in goods is transferred without the possession. Here the general property in the goods remained in the pledgor, though he had parted with the possession. Only a special property passed to the pledgee, and that had passed independently of the documents. They are not "transfers," nor are they "authorities or licences to take possession of personal chattels as security for a debt." Nor are they "agreements by which

(1) 41 & 42 Vict. c. 31, s. 3: "This Act shall apply to every bill of sale . . . whereby the grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

Sect. 4: "The expression 'bill of sale,' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement . . . by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred . . ."

The Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), is by s. 3 to be construed as one with the previous Act, and, by the same section "the expression 'bill of sale,' and other expressions in this Act have the same meaning as in the previous Act, except as to bills of sale or other documents mentioned in s. 4 of the previous Act, which may be given otherwise than by way of security for the payment of money. . . ."

Sect. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

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a right in equity to any personal chattels, or to any charge or security thereon," is conferred. The right of the pledgee is a legal right. The pledgor might be entitled to an account in a Court of Equity, but that would not be a right in equity; it would be equitable relief in aid of a legal right. The Bills of Sale Acts apply only to documents on which the title of the transferee of goods depends: *Marsden* v. *Meadows.* (1) The Acts do not apply to any case "where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee:" *Ex parte Close.* (2) The latter case is not really overruled by *Ex parte Parsons* (3), which has no application to the present case.

Sir H. Davey, Q.C., and *Muir Mackenzie*, for the official receiver. The policy of the Act of 1882 is entirely different from that of the previous Bills of Sale Acts. The object of the previous Acts was to prevent persons from gaining false credit by means of the possession of goods which were not their own property. The object of the Act of 1882 is to protect borrowers from the devices of money lenders. It is an inference of fact in each case whether the possession of the goods was intended to be taken by the grantee on the faith of the document, or whether the document is only a record of a transaction previously complete. In the present case the fair conclusion from the examination of the bankrupt is, that possession of the goods was not given to the appellant till after the execution of the documents.

The documents are "transfers" within the meaning of s. 4 of the Act of 1878, and, having regard to the evidence, they are "licences to take possession" of the goods "as security" for the debt. They give the grantee a power to sell the chattels. If there was a complete antecedent transaction which gave the grantor a power of sale, it would have been unnecessary to insert a power of sale in the documents. At any rate the documents confer "a right in equity" to the goods, or to "a charge or security thereon."

[BOWEN, L.J, referred to *Reeves* v. *Barlow* (4) as shewing the meaning of the expression "a right in equity."]

The grantee has under the documents a right to a charge which

(1) 7 Q. B. D. 80, 84.
(2) 14 Q. B. D. 386, 393.
(3) 16 Q. B. D. 532.
(4) 12 Q. B. D. 436.

can be enforced in equity by sale, and the pledgor would be entitled to an account.

In *Marsden* v. *Meadows* (1) the goods were sold by the sheriff under an execution. The Divisional Court have rightly interpreted *Ex parte Parsons.* (2)

LORD ESHER, M.R. It appears that the only difficulty which was felt by the Divisional Court arose out of the interpretation which they put on some of the language which was used by this Court in *Ex parte Parsons.* (2) With great deference to the learned judges, I think that, if they had examined the judgments delivered in *Ex parte Parsons* (2) as a whole, they would have seen that they have been attributing to us that which we never intended to say. In coming to the conclusion at which they did arrive they must have thought that we intended in *Ex parte Parsons* (2) to overrule several recent cases in this Court, to the decision of which some of us had been parties. All that we then intended to say about *Ex parte Close* (3) and *In re Cunningham & Co.* (4) was with reference to what we supposed (whether rightly or wrongly) to have been the ratio decidendi of those cases. In my judgment in *Ex parte Parsons* (5) I said: "Then this difficulty arises, that two learned judges, for whose opinion we have the greatest respect, have in substance held this—that, when there is such an ordinary transaction as an advance of money upon the security of goods, the arrangement being that possession of the goods is to be given to the lender immediately, you cannot by any possibility express the transaction in the statutory form, and therefore the legislature could not have intended to deal with such a transaction at all. The true conclusion must, therefore, be that s. 9 does not apply to a document by which the right to immediate possession of goods is given. The legislature could not have intended to prevent such transactions altogether." That shews what we supposed to have been the ratio decidendi in *Ex parte Close* (3) and *In re Cunningham & Co.* (4) I went on to say, "Is that a process of reasoning which the Court ought to allow?" But Cave, J., in his judgment in *Ex*

(1) 7 Q. B. D. 80.
(2) 16 Q. B. D. 532.
(3) 14 Q. B. D. 386.
(4) 28 Ch. D. 682.
(5) 16 Q. B. D. 544.

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parte Parsons (1) explains that he did not intend to say what he was supposed to have said in *Ex parte Close.* (2) It is strange, however, that Lindley, L.J., in *Ex parte Parsons* (1) had exactly the same idea about the ratio decidendi of *Ex parte Close* (2) and *In re Cunningham & Co.* (3) as I had, for he said (4): "It appears to me that the reasoning of the judges in the two cases which have been cited—that, because you cannot express a transaction in the form given in the schedule to the Act of 1882, therefore the Act does not apply to it—is erroneous." Perhaps we ought now to set the matter right by saying that, if the learned judges in those two cases had used that process of reasoning, we could not have agreed with them; and, if that word "if" had been inserted, the learned judges in the present case could hardly have come to the conclusion at which they arrived as to the meaning of *Ex parte Parsons.* (1) The ground, therefore, of their judgment cannot be supported.

We must see, however, whether their decision was right without vouching for it a supposed opinion of the Court of Appeal, which had no existence in fact. The documents which it is sought to avoid are not bills of sale in the ordinary meaning of the term. The question is whether they are bills of sale within the Act of 1882, and this they cannot be unless they satisfy the terms of the definition contained in s. 4 of the Act of 1878. It cannot be denied that bills of sale are dealt with differently by the two Acts; the objects of the two Acts are different, but they both relate to the same subject-matter. Are these documents then "bills of sale" within s. 4 of the Act of 1878? It is argued that they are "transfers" of personal chattels. I think the word "transfer" in s. 4 means a document which, though not in form a bill of sale, assumes to transfer the property in goods in the same way as a bill of sale would. I suppose a mortgage would come within that description. But it is impossible to say that these documents assume to transfer the property in any goods. Then it is said that they are authorities or licences to deal with the possession of personal chattels as security for a debt. If that was the definition in s. 4 they would be within it. But those are not

(1) 16 Q. B. D. 532.
(2) 14 Q. B. D. 386.
(3) 28 Ch. D. 682.
(4) 16 Q. B. D. 547.

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the words of the definition; the words are, "authorities or licences to *take possession* of personal chattels as security for any debt." If these documents gave the grantee a right to *take possession* of goods, even though it was a right to take immediate possession, then, as we held in *Ex parte Parsons* (1), they would be within the Act. But a right to take possession means a right to take it whether the grantor likes it or not. If the real transaction does not depend on the power of the one party to take possession against the will of the other, but on the one voluntarily giving and the other receiving possession—if the transaction does not begin at all until the grantor voluntarily gives possession of the goods to the grantee—that is not an "authority or licence to *take* possession of personal chattels." This excludes from the definition such a transaction as a pledge of goods, for the essence of a pledge is that the grantee says to the grantor, I will lend you money if and when you deposit certain goods with me. It is not, I will lend you money on the security of an authority to take possession of certain goods. The transaction begins with the voluntarily giving possession of the goods by the pledgor to the pledgee. This is the nature of a pledge, and the expressions used in the documents now in question seem to describe a pledge in the simplest terms. The grantee was advancing money to the grantor on the security of an actual deposit of goods. All the four documents are substantially to the same effect. No doubt they regulate the rights of the grantee with regard to goods of which he has already the possession, but they give him no authority to take possession of the goods. When a transaction is one of pledge, and nothing more, the document which describes it is not a "bill of sale" in the ordinary sense of the words, or within s. 4 of the Act of 1878, and therefore it is not within the Act of 1882. The decision of the Divisional Court was wrong, but it was wrong only by reason of their wrongly interpreting the language used in *Ex parte Parsons* (1), and giving to it a meaning which it will not properly bear.

BOWEN, L.J. We have to decide whether certain documents are "bills of sale" and avoided as such by the Act of 1882. It

(1) 16 Q. B. D. 532.

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is to be observed that the Act avoids certain documents, which it describes as bills of sale. It often happens that, if a document which relates to a transaction fails, the transaction itself falls to the ground; the invalidity of the document puts an end to the validity of the transaction. On the other hand, it may often happen that the transaction will stand by its own strength, even if the document is avoided. In the present case Hubbard agreed to lend the money on the security of certain machines. Hardwick signed an agreement. The money was advanced by Hubbard, and the machines were left with him. The document narrated what had been done; it acknowledged the receipt of the money, and it contained certain conditions and provisions as to the sale of the machines by Hubbard, if default should be made by Hardwick in the repayment of the money at the time appointed. What was the nature of that transaction? There are two well-known and entirely distinct kinds of transaction. There is a mortgage of chattels, when there is no delivery of the chattels to the mortgagee, but the general property in them passes to him by the mortgage deed. There is another entirely distinct transaction, which was known to the Romans, and has been long familiar to English law, the transaction of a pawn or pledge, where there must be a delivery of the goods pledged to the pledgee, but only a special property in them passes to him, in order that they may be dealt with by him, if necessary, to enforce his rights—the general property in the goods remaining in the pledgor. A special property in the goods passes to the pledgee in order that he may be able—if his right to sell arises—to sell them. In all such cases there is at Common Law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed, or after notice by the pledgee. If the pledge is accompanied by a written document, still the essence of the transaction is that actual possession of the goods should be given to the pledgee. Would you expect the document to give the pledgee a right to take possession of the goods? On the contrary, you would only expect that it would regulate the terms on which they were to be held and applied by him. That is exactly what the documents now in question do. The transaction appears to me

to be a pawn or pledge, accompanied by a document regulating the rights of the pledgee with regard to the goods of which the possession is delivered to him. I consider it clear that a document of this kind, which is not intended to transfer the property in goods, or to give any right to the possession of them, is not within either of the Bills of Sale Acts, and is not struck at by either of them. It was argued that the Act of 1882 was intended to give further protection to borrowers, and to place further restrictions on lenders of money. Very likely that is so. But the expression "bill of sale" is defined in the Act of 1882 by reference to the Act of 1878—either to s. 4 or to the entire Act, i.e., to s. 4 as modified by s. 3. It is not necessary now to determine what is the exact bearing of s. 3 on s. 4; if it were, I should wish to take further time for consideration. It must be admitted that, unless these documents fall within s. 4, the case of the trustee for upsetting them must fail. Do they fall within s. 4? That section includes all ordinary bills of sale, and also a number of other documents. Are these documents "transfers"? They cannot be if it is essential to a "transfer" that it should pass the general property in goods, for they do not pass any property at all. If they even passed a special property in the goods, I doubt whether the word "transfer" would apply to them. Nothing is more confusing than the expression "a document which passes the property in goods." It is the contract which passes the property. These documents do not of themselves pass any property at all.

It was next argued by Sir H. Davey that these documents are "licences to take possession of personal chattels as security for a debt." Are they licences to take possession at all? By that expression is meant a licence which gives an option to the licensee to leave the possession of the goods with the licensor or to take it from him. It seems to me that only such documents can fall within this definition as are consistent with the possession of the goods remaining with the grantor, and that, if it was never intended that the possession should remain with him, but it was intended that the possession should at once be given to the grantee, it is impossible to say that the definition applies. It

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seems to me that Cave, J., laid down the law correctly in *Ex parte Close* when he said (1) that the Bills of Sale Acts do not include "any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee." Our present decision rehabilitates *Ex parte Close* (2), if it was ever supposed to have been impeached. *Ex parte Parsons* (3) does not decide that the Bills of Sale Act of 1882 applies to documents which regulate the rights and liabilities of the pledgor and pledgee of goods; it does not decide anything to the contrary of that which Cave, J., affirmed in *Ex parte Close* (2); it does not decide that any documents fall within the Act of 1882 which are not "bills of sale" either in the ordinary sense of the words or in the interpretation given to them by the Act of 1878; and it does not decide that the Act of 1882 strikes at any documents the object and effect of which is to transfer the immediate possession of goods from the grantor to the grantee. But *Ex parte Parsons* (3) does decide that the Acts apply to documents which authorize the grantee to take possession of goods, notwithstanding that they authorize him to take immediate possession, and it does decide that it is no answer to the Act to say that the nature of the transaction was such that the document could not be brought within the form scheduled to the Act. I think the language used by the judges of the Court of Appeal in *Ex parte Parsons* (3) proceeded from a misconception on their part of the ratio decidendi of *Ex parte Close* (2), but it does not follow that they overruled the real ratio decidendi.

The third contention was that these documents are "agreements by which a right in equity to personal chattels, or to a charge or security thereon," is conferred. The answer is that these documents do not confer any right in equity, but only regulate the exercise of a legal right. I think that those words were intended to bring within the Act documents which create a right in equity as distinct from a right at law. If any authority were needed for this view, it will be found in *Reeves* v. *Barlow* (4) where it was the foundation of the decision of the Court of Appeal.

(1) 14 Q. B. D. 393.
(2) 14 Q. B. D. 386.
(3) 16 Q. B. D. 532.
(4) 12 Q. B. D. 436.

FRY, L.J. The first inquiry is, what is the true nature of the transaction which is evidenced by each of these documents? In my view the documents truly express the real terms of the transaction. It has been suggested that the Court ought to read between the lines, and to see that they do not express the real transaction, but that, in fact, the document was first executed, and that thus the lender of the money was enabled to seize the chattels. I can see nothing in the evidence to lead to such a conclusion. On the contrary, I think that the chattels were deposited with the lender first, that the document was then executed, and that the borrower then received the money.

The question then arises whether s. 9 of the Act of 1882 makes these documents void. It appears to me that the effect of s. 9 is to make void every document which is included in s. 4 of the Act of 1878, which does not in substance comply with the statutory form. My present impression is that s. 4 is not modified by s. 3, but that s. 3 applies the provisions of the Act to each of the instruments which is mentioned in s. 4. Is then a document such as those with which we are now dealing aimed at by the Act of 1882? It appears to me that these documents really describe a transaction of pawn or pledge, and do nothing more. There is no transfer of the general property in the goods; it remains in the pledgor. A special property only passes to the pledgee. A power of sale of the goods by the pledgee arises on default in payment by the pledgor of the money advanced at the time specified or on notice by the pledgee. Is a transaction of pawn or pledge within s. 4? It was not contended that it is. I agree with the view of Cave, J., that documents which only regulate the relations of the pledgor and pledgee of chattels are not within s. 4, and I rest my decision of this case upon that.

I ought, perhaps, to refer to those words in s. 4 which have been relied upon. It was argued that these documents are "transfers." I am of opinion that they are not, for the general property in the goods remains with the borrower; there is no transfer to the lender of anything but a special property. Are these documents "authorities or licences to take possession of personal chattels as security for a debt"? The answer is that they are nothing of the kind. Possession of the goods, which is essential

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to the validity of every pawn or pledge, was given to the pledgee, and it is impossible to take possession of that of which you have already got possession. The possession preceded the execution of the documents. I agree with Bowen, L.J., that when s. 4 speaks of an agreement "by which a right in equity to any personal chattels shall be conferred," it means a right in equity as distinguished from a right at law. In the present case the instruments conferred no equitable right whatever; they only regulated the exercise of a legal right. No doubt a pledgee may in some cases enforce his charge in a Court of Equity, but in that case the relief which the Court of Equity would give would not be in respect of "a right in equity," but would be equitable relief in respect of a legal right. These documents, therefore, do not in my opinion come within any part of the definition in s. 4. It appears to me that *Ex parte Parsons* (1) when properly understood, does not in any way conflict with our present decision.

Appeal allowed.

Solicitor for appellant: *J. Sheldon Hepworth, for C. G. Barnes, Hastings.*

Solicitor for official receiver: *W. Murton.*

(1) 16 Q. B. D. 532.

W. L. C.

DAY *v.* WARD.

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Aug. 2, 12.

Practice—Solicitor, Privilege of, to be sued only in High Court—Mayor's Court.

A solicitor of the High Court, who had also been admitted a solicitor in the Mayor's Court, was sued in the latter court:—

Held, that he was not entitled to have the action removed into the High Court on the ground of the privilege of a solicitor of the High Court to be sued in that court only.

APPEAL from the order of Day, J., at chambers, granting a writ of certiorari to remove an action from the Mayor's Court into the High Court.

The defendant in the action was a solicitor of the High Court, and had obtained the order for the certiorari on the ground that he was as such solicitor entitled to the privilege of being sued only in the High Court. The defendant had signed the roll of the Mayor's Court, and been admitted as a solicitor in such court.

Glyn, for the plaintiff, moved to rescind the order of Day, J. He contended that the defendant being a solicitor both of the High Court and the Mayor's Court, might be sued in either court.

He cited *Walford* v. *Fleetwood*. (1)

Probyn, for the defendant, shewed cause.

Cur adv. vult.

Aug. 12. The judgment of THE COURT (Field and Butt, JJ.), was delivered by

FIELD, J. The ground upon which the order for the certiorari was made in this case was that the defendant being a solicitor of the High Court was entitled to the privilege of being sued only in the High Court. The right so claimed is based upon the old practice, which is very clearly stated in Tidd's Practice, p. 75. He there says: "An attorney when duly admitted, enrolled, and

(1) 14 M. & W. 449.

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certificated, is supposed to be always present in court: and on that account has many privileges belonging to him in common with the other officers of the Court. Where an attorney of the King's Bench or Common Pleas is plaintiff, he is entitled to sue in his own court by attachment of privilege, and may lay and retain the venue in Middlesex. When he is defendant, he must be sued in his own court by bill, even as acceptor of a bill of exchange, and cannot be arrested or holden to special bail." At p. 77, the learned author says: "these privileges are allowed not so much for the benefit of attorneys as of their clients." In answer to the claim of privilege so made by the defendant, the plaintiff sets up in his affidavit the fact that the defendant is also enrolled as a solicitor on the roll of the Mayor's Court. It appears that the Mayor's Court, being an inferior court, is within the provisions of the 27th section of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and therefore, the defendant having been admitted a solicitor of the High Court, and such admission continuing in force, he was entitled to be admitted in the Mayor's Court on signing the roll thereof, and that the defendant did in pursuance of the section sign such roll and was admitted accordingly. Under these circumstances the question arises whether the defendant is privileged against being sued in the Mayor's Court. The reason stated for the privilege is that he is supposed to be always present in the High Court, but I suppose that being a solicitor of the Mayor's Court he is also bound to be present in that court. If this reasoning were applied in this case, it would be impossible to say where the defendant could be sued; for if he were sued in this court, it might equally well be argued that he was bound to be present in the Mayor's Court, and ought to be sued there. If there had been a subsisting privilege with regard to such a case as this, we should not have been inclined to alter it; but it does not appear to us that there is such a privilege. The privilege is stated to exist for the benefit of the clients, but, where a solicitor is on the roll of the High Court, and also on that of an inferior court, it would be impossible to determine in which court his presence was most requisite in the interests of his clients. The ground of the alleged privilege of being sued only in the superior Court appears to

me to fail in this case, because the reason for it here appears to apply equally to the inferior court as to the High Court.

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For these reasons we think that the order for the certiorari must be rescinded.

Order rescinded.

Solicitor for plaintiff: *N. White.*
Solicitor for defendant: *Ward.*

E. L.

[IN THE COURT OF APPEAL.]

June 8, 9; *Aug.* 9.

THE FINE ART SOCIETY, LIMITED *v.* THE UNION BANK OF LONDON, LIMITED.

Trover—Conversion—Post Office Order cashed through Bankers—Negotiable Instrument—Estoppel.

The plaintiffs banked with the defendants. It was the duty of the plaintiffs' secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank to the credit of the plaintiffs. The secretary without the knowledge of the plaintiffs kept an account at the defendants' bank. He paid into the defendants' bank to his own credit certain post office orders belonging to the plaintiffs which the defendants subsequently cashed The Post Office regulations with regard to post office orders provide that, when presented for payment by a banker, they shall be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is written or stamped upon it:—

Held, that there had been a wrongful conversion of the post office orders above mentioned by the defendants; and that the regulations of the Post Office with regard to the payment of post office orders presented through bankers did not give to those instruments in the hands of bankers the character of instruments transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin* v. *Robarts* (1 App. Cas. 476), and thus give the defendants a good title to the post office orders independently of the authority given to the plaintiffs' secretary.

APPEAL from the judgment of Day, J., in an action against the defendants for wrongfully disposing of certain post office orders the property of the plaintiffs, and for receiving the amounts thereof and not accounting to the plaintiffs for the same.

The case came on for trial before Day, J., and a special jury, when the jury was by consent discharged, and the learned judge held that there had been a conversion of certain post office

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orders belonging to the plaintiffs by the defendants upon the facts proved before him, which were as follows:—

The plaintiffs banked with the defendants. A person named Mugford was employed by the plaintiffs as their secretary. It was his duty to open letters addressed to the plaintiffs and receive from the other officials of the plaintiffs all moneys which might come to their hands on behalf of the plaintiffs and to pay all moneys so received by him to the plaintiffs' account with the defendants. Mugford had a banking account with the defendants, but there was no evidence to shew that this fact was known to the plaintiffs. He had received a number of post office orders on behalf of the plaintiffs and wrongfully paid them in to his own account with the defendants. The defendants had subsequently cashed these orders. It appeared that the orders were issued by the Post Office in a form and under regulations by which it was provided that the payee of the order should in ordinary cases sign a receipt in the form appearing in the order, but among the Post Office regulations with regard to post office orders there was one in the following terms:—"Any money order made payable to any person or persons whomsoever at a post office in any city, town, or place within the United Kingdom may be presented for payment by or through any banker or bankers either at such post office at which the same is made payable or at the chief money order office in London, notwithstanding that the form of receipt on such money order may not bear any signature purporting to be the signature of the person or persons to whom such money order is made payable, provided that the name of the banker or bankers by or through whom such money order is presented for payment be written or stamped upon the face thereof; and the name of such banker or bankers so written or stamped as aforesaid shall be accepted at such post office or chief money order office as a sufficient receipt for the amount of such money order."

The learned judge gave judgment for the plaintiffs for the amount of the post office orders so received by the defendants.

Against this judgment the defendants appealed.

Cohen, Q.C., and *Pollard*, for the defendants. There was no

conversion of the post office orders by the defendants. The orders were handed to the defendants by an agent of the plaintiffs, who was authorized to deliver them to the defendants for the purpose of getting the same cashed: and the defendants received and cashed them. All that was done by the bank in receiving and cashing the post office orders was exactly what they were authorized to do in pursuance of the authority given to the plaintiffs' agent, and therefore could not amount to a conversion. The fraud was in the subsequent misapplication of the proceeds by the agent, for which the defendants are not responsible.

So far as regards the physical dealings with the piece of paper, the defendants did nothing which they were not intended by the plaintiffs to do or which Mugford was not authorized to instruct them to do. A person, who deals with goods as a mere intermediary in the course of his business, is not liable as for a conversion: *Hollins* v. *Fowler*. (1) It is apparent from the Post Office regulations that it is part of the business of bankers to collect post office orders.

The plaintiffs cannot sue for misapplication of the proceeds of the orders because they were not received by the defendants on account of the plaintiffs. It was as if the orders had been cashed by Mugford, and the proceeds misapplied by him.

Secondly, the post office orders were, by virtue of the Post Office regulations, in the nature of instruments payable to bearer in the hands of a banker, and so, being taken by the defendants in good faith, the defendants obtained a title to them independently of Mugford's title: *Goodwin* v. *Robarts*. (2) Thirdly, the plaintiffs are under the circumstances estopped from setting up their title to these post office orders against the defendants. They intrusted to their agent, for the purpose of its being paid into and cashed through a bank, an instrument which in the hands of a banker becomes a quasi negotiable instrument, an instrument on the face of it stating that when presented by any banker it is payable without the signature of the payee. They thus gave Mugford the means of committing this fraud and of inducing the bank to collect the orders and hand over the proceeds to him; and the case comes within the proposition that of

(1) Law Rep. 7 H. L. 757. (2) 1 App. Cas. 476.

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two innocent parties the one that has conduced to the commission of a fraud must suffer. On this ground also, the decision in *Goodwin* v. *Robarts* (1) applies.

They also cited *Glyn, Mills, & Co.* v. *East and West India Dock Co.* (2); *Symonds* v. *Atkinson* (3); *Stierneld* v. *Holden.* (4)

Finlay, Q.C., and *R. Vaughan Williams,* for the plaintiffs. There was a conversion by the defendants of the post office orders. The authority given by the plaintiffs to Mugford was to pay the orders in to their account, i.e., to hand the orders to the bank, with instructions to collect the amounts and credit the plaintiffs' account with them. The defendants received and dealt with the orders on Mugford's account, and not on the plaintiffs' account. So dealing with them was a conversion. The question quo intuitu a chattel is dealt with is material in ascertaining whether there has been a conversion. Mugford, in paying the orders into the bank to his own account, clearly converted them; and it must follow that the bank also, in dealing with them after such wrongful delivery of them by Mugford on his own account, were guilty of a conversion. The defendants took the orders as Mugford's agents to collect them, and their keeping them for Mugford and cashing them was wrongful as against the plaintiffs. It is also clear that the defendants were liable as for a misapplication of the proceeds.

They cited on these points *Arnold* v. *Cheque Bank* (5); *Ogden* v. *Benas* (6); *Patent Safety Gun Cotton Co.* v. *Wilson.* (7)

The answer to the argument that in the hands of the bank these orders were quasi negotiable instruments is that they do not acquire that character till after there has already been a wrongful conversion of them by receiving them on account of Mugford. The case is, therefore, altogether distinguishable from *Goodwin* v. *Robarts.* (1) The post office order does not become a quasi negotiable instrument in the hands of the banker by virtue of the post office regulation. It is merely a provision for convenience in business, that in the case of presentment by a banker

(1) 1 App. Cas. 476.
(2) 7 App. Cas. 591.
(3) 1 H. & N. 146; 25 L.J. (Ex.) 313.
(4) 4 B. & C. 5.
(5) 1 C. P. D. 578.
(6) Law Rep. 9 C. P. 513.
(7) 49 L. J. (C. P. D.) 713.

the receipt which is in other cases required will not be required, because it may be presumed that a banker is presenting on behalf of the owner of the order, and the status of the banker is regarded as a sufficient guarantee that all is right. With regard to the question of estoppel, there was nothing in the nature of negligence in the conduct of the plaintiffs, and there is no finding of any negligence. If any such question was intended to be raised, the opinion of the jury ought to have been taken upon it.

Cohen, Q.C., in reply.

Cur. adv. vult.

Aug. 9. The following judgments were delivered:—

LORD ESHER, M.R. In this case the plaintiffs have brought an action against the defendants for the alleged wrongful conversion of certain post office orders. The circumstances, which were somewhat peculiar, were in effect as follows. The plaintiffs received certain post office orders, and handed them to a clerk of theirs to be paid in to their account at their bankers, the defendants. The clerk himself had an account at the same bank. There was, however, no evidence to shew that this fact was known to the plaintiffs.

The clerk paid the orders in question in to his own account, and the bank acting for him presented the orders to the post office, received the money for them, and placed it to his credit. The clerk in acting as he did was guilty, no doubt, of gross fraud, and it is clear that he exceeded the authority given to him, for the orders were handed to him to pay in to the account of his employers the plaintiffs, not his own account. The bank received them innocently, but they received them not for the plaintiffs but for the clerk, who in so paying them in to his own account was acting without authority. It seems to me that such receipt was in itself strong evidence of a conversion. The plaintiffs' property was handed to the defendants, and received by them as the property of the person so handing it over, he having no authority so to deal with it. But when the defendants took the post office orders to the post office, and handed them over in exchange for the money, I cannot doubt that there was a conversion. For these reasons, looking at these documents merely

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as post office orders, and as such not being negotiable instruments, I cannot doubt that what took place amounted to a conversion, and, therefore, in this view of the case the defendants would be liable.

But it was suggested that these documents had been treated as between the Post Office and bankers and parties presenting them through bankers as if they were negotiable instruments, though in fact they are not, so that the doctrine applied in *Goodwin* v. *Robarts* (1) was applicable. But that decision was upon a special case, in which there was a statement to the effect that the documents there in question had been treated as negotiable instruments by all parties dealing with the same, by bankers and mercantile men both in this country and all over Europe for more than fifty years. It was held upon that statement in the Courts below and ultimately in the House of Lords, that for the purposes of the question at issue the documents must be treated as if they were negotiable instruments. And so, if there had been a conversion, it was one of which advantage could not be taken. I do not think it can be said that the documents here in question have obtained the same position as that of the documents in *Goodwin* v. *Robarts*. (1) It seems clear that they have not been treated as negotiable instruments by the general practice in England. I do not think it is shewn that bankers or merchants or the Post Office have, for all purposes and with regard to all persons, so treated them. They have none of the attributes of negotiable instruments. It is urged that the doctrine of estoppel, as stated in *Goodwin* v. *Robarts* (1), ought to be applied to this case. The House of Lords there said that, even if the instruments were not negotiable, the mode in which they had been treated both here and abroad was such that it must be taken that the plaintiff was aware of it, and that in handing them over to another person he put it in his power to hand them over as negotiable instruments. I think that the proposition as there stated was only stated as applicable to the facts of the special case, which contained a statement that the form of instrument then in question had been treated as a negotiable instrument by the mercantile world, and by all parties dealing with it,

(1) 1 App. Cas. 476.

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both in this country and abroad. It does not seem to me that there is anything in this case upon which such an estoppel could be founded against the plaintiffs. It might possibly have been argued that there was an estoppel if they knew of the fact that their clerk kept an account at the same bank, although as at present advised I do not think that would be so. But I do not think there was anything to shew such knowledge on their part. I should say that as an ordinary matter of business persons would not suppose that such was the case. For these reasons I think the case falls within the ordinary rules as to conversion, and not within the doctrine of *Goodwin* v. *Robarts*. (1)

FRY, L.J., delivered the judgment of himself and Bowen, L.J. The facts of this case are shortly as follows: The plaintiffs banked with the defendants. The plaintiffs employed as their secretary one Mugford, whose duty it was to open the letters which reached the plaintiffs, and to receive from the other officials of the plaintiffs all moneys which came to their hands, and to pay into the bank of the defendants all moneys which he received. Mugford also had a banking account with the defendants. There is no evidence that that fact was known to the plaintiffs, Mugford's employers. Mugford, in the way above mentioned, received a considerable number of post office orders, and these he wrongfully paid into the defendants' bank to his own account.

For the amount of these orders, together with other sums not now in controversy, this action has been brought and judgment given by Day, J. From this judgment the defendants have appealed.

Three questions have been raised by the defendants. In the first place they say that there was no conversion by them of the post office orders or misappropriation of the moneys received by virtue of them; secondly, that the post office orders were instruments transferable to bearer by delivery; and thirdly, that the plaintiffs were by intrusting those orders to Mugford estopped from setting up their legal title to them.

Now first as to conversion. We are of opinion that, when Mugford handed a post office order across the counter of the bank with a direction to the defendants to take it and to receive the

(1) 1 App. Cas. 476.

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money for it and to carry that money to the credit of his account, and when the bank clerk so took the post office order, the bank converted it; for, to use the language of Lord Ellenborough in *McCombie* v. *Davies* (1), "a man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?" It is said, indeed, that in the present case Mugford had authority to dispose of the post office orders by handing them over to this very bank. But the answer is that his authority was only to hand them to the bank with directions to receive the money on account of the plaintiffs, and that consequently the act of Mugford in handing them to the bank with the directions which he gave was an act as wholly unauthorized as if he had no authority whatever to dispose of them.

But we are further of opinion that the act of the bank in receiving the money from the post office and treating the same as the money of Mugford was a wrongful application of the money by the bank. The point which thus arises arose for decision in the case of *Arnold* v. *Cheque Bank* (2), and we see no reason to differ from the conclusion arrived at in that case.

In the next place the defendants contend that these post office orders were documents transferable to bearer or were in the nature of such documents, and that the bank, having taken them in good faith, obtained a title to them independent of the title or want of title in Mugford. It appears that money orders are issued by the post office on a form and under regulations which provide that the payee of the order shall in ordinary cases sign a receipt in the form appearing on the order. But amongst the regulations is one in the following terms: "Any money order made payable to any person or persons whomsoever at a post office in any city, town, or place within the United Kingdom may be presented for payment by or through any banker, or bankers, either at such Post Office at which the same is made payable or at the chief money order office in London, notwithstanding that the form of receipt on such money order may not bear any signature purporting to be the signature of the person or persons to whom such money order is made payable, provided that the name of the banker or bankers, by or through whom such money order

(1) 6 East, 538, at p. 540. (2) 1 C. P. D. 578.

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is presented for payment, be written or stamped upon the face thereof; and the name of such banker or bankers, so written or stamped as aforesaid, shall be accepted at such post office or chief money order office as a sufficient receipt for the amount of such money order." It was contended that the effect of this regulation was to make a post office order an instrument which passed by delivery amongst all persons having banking accounts, and we were pressed with the case of *Goodwin* v. *Robarts* (1) in the House of Lords. But in our opinion that is not the true effect of the regulation. We think its operation is only to make the signature of the banker a substitute for the signature to the receipt of the original payee. In the case before the House of Lords the special case stated a custom on the English and foreign exchanges to treat the scrip there in question as passing by delivery; and the decision of the case entirely turned upon the question whether the law of England would follow and give effect to this custom. But in the present case there is no evidence of any like custom with regard to post office orders. Nor is there any such custom of which we have judicial cognizance.

In the third place it was argued, or perhaps rather suggested than argued, that there was something in the conduct of the plaintiffs by which they were estopped as against the bank from setting up their legal title to the post office orders. There appears to us to have been no neglect of any duty which the plaintiffs owed to the defendants or to the general public, and in fact there was no negligence at all; for the plaintiffs could not, and if they could they were not bound themselves to carry the post office orders to the bank, and they were therefore acting reasonably and prudently in entrusting the orders to the care and custody of Mugford, their servant; and by this reasonable conduct they cannot be estopped from asserting their legal claim to the proceeds of the orders.

For these reasons we are of opinion that the decision of Day, J., was right and that the appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs: *Stibbard, Gibson, & Co.*

Solicitors for the defendants: *Lyne & Holman.*

(1) 1 App. Cas. 476. E. L.

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June 22.

COODE AND ANOTHER *v.* JOHNS AND ANOTHER.

Landlord and Tenant—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 49 *to* 52, *and 2nd Sched.—Distress for Rent—Bailiff's Fee on Levy—Percentage.*

In distress for rent under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), the landlord, and not the bailiff, is "the person making the distress" under s. 49, and is therefore entitled to the "percentage" referred to in the second schedule to the Act.

APPEAL by motion from the decision of the judge of the county court at Truro in favour of the defendants.

The action was to recover 6*l.* 3*s.* 6*d.* as having been received by the defendants to the use of the plaintiffs.

The plaintiffs were the owners of a farm at Tadock, Cornwall, and in October, 1885, caused a distress under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), to be levied on the goods of their tenant for 246*l.* 14*s.* arrears of rent; the defendants acted as bailiff and assistant respectively, and received from the tenant 6*l.* 3*s.* 6*d.*, being 2½ per cent. on the amount of rent due, and claimed to retain that sum in addition to the "bailiff's fee" of 1*l.* 1*s.* for the levy, as provided by the second schedule of the Act.

The case was heard on the 18th of March, 1886; when the county court judge gave judgment for the defendants on the ground that the landlord was not entitled to the percentage as "the person making the distress" under s. 49 of the Act.

Hollams, for the plaintiffs. Upon the true interpretation of the Agricultural Holdings Act, 1883, the landlord, and not the bailiff, is entitled to the percentage referred to in the second schedule to the Act. The percentage is to be paid to "the person making the distress." A specific sum of one guinea is allowed "to bailiff for levy," or, where the distress is withdrawn, "reasonable costs and charges." It is the landlord who makes or causes the distress to be made; he therefore is the person entitled to the percentage, to meet the charges he incurs in carrying out the proceedings for the recovery of the rent: this is made abundantly

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clear by ss. 50 and 51. The landlord is the person who puts the machinery of the Act in motion, and who is responsible to the tenant for any irregularities which may be committed. The bailiff is the mere servant of the landlord, though appointed by the judge of the county court.

Charles, Q.C. (*Harris*, with him), for the defendants. Where the bailiff of the county court makes the levy, he is, by the very terms of s. 49 and the schedule, the person entitled to the percentage, by analogy to the provisions of 57 Geo. 3, c. 93, which is still in force. If the landlord makes the distress himself, which he may do, he takes the percentage; otherwise, not.

GROVE, J. I think the words of the Act are sufficiently clear. The provisions which apply more immediately to the question before us are s. 49 to s. 52, both inclusive, and the second schedule. Sect. 49 enacts that "no person whatsoever making any distress for rent on a holding to which this Act applies, when the sum demanded and due shall exceed 20*l.* for or in respect of such rent, shall be entitled to any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the second schedule hereto." Taking that section alone, who is the person contemplated as "the person making the distress?" Clearly, the landlord or other person making the distress is not the bailiff. If the bailiff were the person there contemplated, why is he mentioned in the schedule as the person who is to have a fee of one guinea "for levy?" He is there treated as the person executing the levy: and in no part of the Act that I can discover is he treated as "the person making the distress." He does not elect to levy; he does not set the law in motion; he merely executes the warrant or process; and, in order to prevent abuse, and to insure the due performance of his duty, he is by s. 52, to be appointed by the county court judge, and for any dereliction is liable to have his appointment summarily cancelled. He is no longer, as he possibly was at the time of the passing of the 57 Geo. 3, c. 93, a personal servant of the landlord: he is an officer of the county court. The schedule referred to in s. 49 is as follows: "Levying distress. 3 per cent. on any sum exceeding 20*l.* and not exceeding

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50*l.*; 2½ per cent. on any sum exceeding 50*l.* To bailiff, for levy, 1*l.* 1*s.* To man in possession, if boarded, 3*s.* 6*d.* per day; if not boarded, 5*s.* per day. For advertisements, the sum actually paid." Then comes the percentage payable to the auctioneer, and then these words, "Reasonable costs and charges where distress is withdrawn or where no sale takes place, and for negotiations between landlord and tenant respecting the distress; such costs and charges, in case the parties differ, to be taxed by the registrar of the county court of the district in which the distress is made." It may be that one guinea for the levy may in some cases be an inadequate fee; but in most cases it would be ample or perhaps too large. I think a great deal of light is thrown upon the question who is "the person making the distress" mentioned in s. 49, by a reference to ss. 50 and 51. The 50th section repeals so much of the 2 Wm. & Mary, c. 5, as requires appraisement before sale of goods distrained, as respects any holding to which this Act applies; and it goes on to provide that, "for the purposes of sale, the goods and chattels distrained shall, at the request in writing of the tenant or owner of such goods and chattels, be removed to a public auction-room or to some other fit and proper place specified in such request, and be there sold;" and that "the costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the party requesting the removal." And s. 51 enacts that "the period of five days provided in 2 Wm. & Mary, c. 5, within which the tenant or owner of goods and chattels distrained may replevy the same, shall, in the case of any distress on a holding to which this Act applies, be extended to a period of not more than fifteen days, if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional costs that may be occasioned by such extension of time: Provided that the landlord or person levying the distress may, at the written request or with the written consent of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid." Neither of these sections can have any application to anything to be done by the bailiff: they both

clearly refer to arrangements between the tenant or owner of the goods and the landlord or other person making the distress, that is, the person who causes the levy to be made, who puts the proceedings in motion. The bailiff would have no authority to agree with the tenant or owner of the goods distrained for an extension of the time for replevying, or to fix the amount of security to be required for any additional costs that may be incurred by the extension of the time for selling the goods, or to agree to a sale before the expiration of the extended period. I therefore think the decision of the county court judge was wrong, and that this appeal must be allowed.

GRANTHAM, J. I am entirely of the same opinion. It never could have been meant that a landlord who has to levy a distress should do it at his own cost, and that the ministerial officer, the bailiff, should, in addition to the prescribed fee of one guinea for the performance of the duty imposed upon him, receive to his own use the percentage mentioned in the schedule,—which might in some cases amount to a very considerable sum,—without rendering any service whatever in return. The object of the schedule evidently was, to protect the tenant against extortionate charges by the bailiff and others employed in carrying out the levy; and the percentage was intended as a compensation or indemnity to the landlord for the expenses he might be put to, such as engaging the services of a solicitor, in causing the levy to be made; any extra expense incurred by the bailiff beyond the guinea being amply provided for by the last clause of the schedule. The bailiff's trouble is not materially enhanced by the amount of the levy. The whole solution of this question turns upon what is the meaning of the words "or other person levying the distress." That these words do not mean the bailiff is clear, as it seems to me, from the language of the 51st section. The time for selling the goods distrained may be extended at the request and for the convenience of the tenant or owner of the goods distrained; and the extended time may be shortened. That must necessarily be a matter of arrangement between the landlord and the tenant or owner of the goods, with which the bailiff could have nothing to do. For these reasons, I think the

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bailiff in this case was only entitled to the prescribed fee of one guinea for levying the distress.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *E. W. Williamson, for Coode, Shilson, & Co., St. Austell.*

Solicitors for defendants: *Gregory, Rowcliffes, & Co., for Hodge, Hockin, & Marrack, Truro.*

J. S.

July 30.

[IN THE COURT OF APPEAL.]

EX PARTE FRYER. IN RE FRYER.

Bankruptcy—Judgment Creditor—Order for Committal—Receiving Order in lieu of Committal—Damages payable by Co-respondent in Divorce Suit—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 5—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Divorce Court Act* (20 & 21 *Vict. c.* 85), *ss.* 33, 52.

By s. 103, sub-s. 5, of the Bankruptcy Act, 1883, "where, under s. 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor . . . make a receiving order against the debtor," *Held*, that a receiving order cannot be made on the application of every person who is entitled to apply to the Court under s. 5 of the Debtors Act, but only on the application of a person who is strictly speaking a "judgment creditor."

In a suit for divorce by a husband the jury gave a verdict in his favour, with 1000*l.* damages against the co-respondent, and the judge ordered him to pay the 1000*l.* into court. A subsequent order was made, directing that the co-respondent should pay the 1000*l.* to the husband forthwith, for the purpose of settlement upon the children of the marriage.

Held, that under this order the husband was not, within the meaning of sub-s. 5 of s. 103, a "judgment creditor" of the co-respondent, and that, on the co-respondent's default in paying the money, the Court had no jurisdiction to make a receiving order against him in lieu of committing him.

Decision of Cave, J., reversed.

A judgment debtor makes default in the paying the judgment debt, and the Court has power to commit him under s. 5 of the Debtors Act, if he has had the means of paying any part of it, though he has not had the means of paying the whole.

APPEAL from a receiving order made against the appellant by Cave, J., under sub-s. 5 of s. 103 of the Bankruptcy Act, 1883.

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The appellant was co-respondent in a suit for divorce instituted by a husband against his wife. At the trial before Butt, J., and a special jury, the jury found a verdict for the petitioner, with 1000*l.* damages against the co-respondent. A decree nisi for the dissolution of the marriage was made, and the co-respondent was ordered, within fourteen days from the service of the order on him, to pay into court the sum of 1000*l.*, being the amount of damages assessed by the jury.

On the 11th of August, 1885, on the application of the petitioner, the Court made an order by which it was ordered that the order of the 5th of April, 1884, should be varied, and that the co-respondent should pay the sum of 1000*l.* to the husband forthwith, for the purpose of settlement upon the children of the marriage. No part of the 1000*l.* was paid, and on the 31st of May, 1886, the husband issued a judgment summons against the co-respondent, under s. 5 of the Debtors Act, 1869.

On the evidence Cave, J., held that the co-respondent had, since the dates of the orders of the Divorce Court, had the means of paying at any rate a considerable part of the 1000*l.*, and, with the consent of the husband, he made a receiving order against the co-respondent in lieu of a committal.

The co-respondent appealed.

Channell, Q.C., and *Sidney Woolf*, for the appellant. (1.) The power given by sub-s. 5 of s. 103 of the Bankruptcy Act, 1883 (1),

(1.) Sect. 103 provides "(1. It shall be lawful for the Lord Chancellor by order to direct that the jurisdiction and powers under s. 5 of the Debtors Act, 1869, now vested in the High Court, shall be assigned to and exercised by the judge to whom bankruptcy business is assigned.

"(5.) Where, under s. 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and, in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made."

On the 1st of January, 1884, the Lord Chancellor made an order under s. 103, that on and after that day "the jurisdiction and powers under s. 5 of the Debtors Act, 1869, now vested in the High Court of Justice, shall be assigned to and exercised by the judge to whom bankruptcy business is assigned."

Rules 265–270 of the Bankruptcy

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to make a receiving order against a debtor in lieu of a committal exists only where the application for a committal is made by "a judgment creditor" in the strict sense of the word. A receiving order cannot be made on the application of every person who is entitled to apply for a committal order under s. 5 of the Debtors Act. In *Linton* v. *Linton* (1) it was held that arrears of monthly payments of alimony, payable by a husband under an order of the Divorce Court, constituted a debt enforceable under s. 5 of the Debtors Act, 1865. But in the present case the husband is not a "judgment creditor" of the co-respondent in respect of the damages; the order of the 11th of August directs that the damages are to be paid to him, but only "for the purpose of settlement upon the children of the marriage." Under s. 33 of the Act 20 & 21 Vict. c. 85, the Divorce Court has full power to direct how the damages are to be applied. They are not the property of the husband or due to him personally; the order merely makes him a quasi receiver to collect the money; it does not make him "a judgment creditor." The principle of the decision in *Ex parte Muirhead* (2) applies. There it was held that damages ordered by the Divorce Court to be paid by a co-respondent to the husband, the husband undertaking to pay them into the registry to abide the further order of the Court, would not support a bankruptcy petition by the husband against the co-respondent, on the ground that the husband had no title to the money at law or in equity, but was in the position of a receiver. If a person to whom damages are ordered to be paid in this way in a divorce suit cannot present a bankruptcy petition in respect of them, he cannot in this indirect mode obtain a receiving order.

(2.) But, even if the husband is "a judgment creditor" of the co-respondent, a receiving order can be made only if the circumstances would have justified a committal. An order for committal

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Rules, 1883, relate to the procedure under s. 5 of the Debtors Act, 1869, and s. 103 of the Bankruptcy Act, 1883.

Sect. 5 of the Debtors Act, 1869, provides, "Subject to the procedure hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court."

(1) 15 Q. B. D. 239.

(2) 2 Ch. D. 22.

can be made only where there has been default in payment of the exact sum which has been ordered to be paid. It must be shewn that the debtor has, or has had since the order was made, the means of paying substantially the whole sum ordered to be paid, and here it is only shewn that he has had the means of paying a part of it. The debtor's means must be strictly proved: *Chard* v. *Jervis*. (1)

Cooper Willis, *Q.C.*, and *Herbert Reed*, for the husband. The 1000*l.* is due under the judgment of the Court of the 5th of April, and, though that was varied by the subsequent order of the 11th of August, there is a final judgment for the payment of 1000*l.* The effect of the order of the 11th of August is very different from that of the order which was made in *Ex parte Muirhead* (2). There the husband had undertaken to pay the damages into Court, when he received them, to abide the further order of the Court, and under those circumstances the Court held that he was a mere conduit-pipe or receiver. In the present case the Court has already decided that the money is to be settled on the children, and the husband is in the position of a trustee of the 1000*l.* for the children. The objects of the trust are clearly defined, and as trustee he is a judgment creditor of the co-respondent for 1000*l.*

The object of varying the original order, and making the 1000*l.* payable to the husband, was, that he might be able to prove for it in the bankruptcy of the co-respondent: *Patterson* v. *Patterson*. (3) The order of the Divorce Court could be enforced by a fi. fa.: *Pritchard* v. *Pritchard*. (4) Sect. 52 of the Act 20 & 21 Vict. c. 85, enables orders of the Divorce Court to be enforced in the same way as orders of the Court of Chancery were enforced, and rule 17 of Order XLII. of the Rules of the Supreme Court, 1883, gives power to enforce them by fi. fa. or elegit. Sub-s. 5 of s. 103 of the Bankruptcy Act applies to every case in which proceedings can be taken under s. 5 of the Debtors Act in respect of a judgment or order for the payment of a sum of money. In *Wood* v. *Wood* (5) it was held that the petitioner in a divorce suit, being entitled to enforce payment of damages against the co-respondent by process

(1) 9 Q. B. D. 178.
(2) 2 Ch. D. 22.
(3) Law Rep. 2 P. & D. 189.
(4) Ibid. 53.
(5) Law Rep. 1 P. & D. 467.

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of contempt, was a creditor within s. 149 of the Bankruptcy Act, 1861, and that the discharge of the co-respondent in bankruptcy covered the damages.

Channell, Q.C., in reply. In *Pritchard* v. *Pritchard* (1) the damages were given to the petitioner himself.

LORD ESHER, M.R. (after stating the facts). The question is whether Cave, J., had power to make a receiving order, and this depends upon whether the case is brought within the terms of sub-s. 5 of s. 103 which confers the power "where application is made under s. 5 of the Debtors Act by a judgment creditor for the committal of a judgment debtor." It is essential that the applicant should be a "judgment creditor." Can the husband, whose relation to the co-respondent in this matter is determined by the order of the Divorce Court, be said to be a "judgment creditor" of the co-respondent within the meaning of sub-s. 5 of s. 103? If he is not a judgment creditor there was no jurisdiction to make the receiving order. The relation between the husband and the co-respondent under the order of the Divorce Court depends on the construction of the Divorce Court Act. Under that Act an application may be made by a petitioner to recover damages against the co-respondent, on the ground of his having committed adultery with the petitioner's wife, and the damages are to be ascertained by the verdict of a jury. What is the next step after the verdict? The same result does not follow as in a common law action. There the entry of judgment after verdict is a merely ministerial act at the instance of the successful plaintiff, without any interference of the Court. The legal result is that the plaintiff can at once issue a writ of fi. fa., and put it into the hands of the sheriff for execution. But nothing of this kind happens after a verdict for damages in the Divorce Court. The entry of judgment for the damages is not a purely ministerial act. There must be an application to the judge, who has a judicial authority as to the manner in which the damages are to be paid or applied, and who has power to so dispose of the damages that not a farthing of them shall go to the husband. They may be settled upon the wife, who has then become a stranger to the husband, or

(1) Law Rep. 2 P. & D. 189.

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they may be entirely settled on the children of the marriage. The Court no doubt has power to make an order that the damages shall be paid to the husband for his own personal benefit, but this shews that the verdict has not the same result as the verdict in a common law action, for it cannot be enforced without an order of the Court. Under s. 52 of the Divorce Court Act judgment can be enforced by process. A writ of fi. fa. can be issued. But this is not the same fi. fa. as is issued to enforce the judgment in a common law action. It does not issue by the voluntary act of the party.

What then is the relation between the co-respondent who is cast in damages in the Divorce Court and the husband? The Divorce Court need not order the damages to be paid to the husband at all. It may order them to be paid into Court, or to be paid to the registrar of the Court, or to any other person, including the husband himself, as a receiver or collector. If an order is made for payment of the damages to the husband in order that he may bring the amount into court to be dealt with by the Court, what is the relation thereby constituted between the co-respondent and the husband? Is it the relation of debtor and creditor? That seems to have been the question in *Ex parte Muirhead* (1), which was a decision of the Court of Appeal and is binding on us—that is, we are bound to follow it so far as it laid down a principle which is applicable to the present case. As I understand it, the decision there was that the relation between a husband and a co-respondent, under an order exactly equivalent to the order in the present case, was this, that the husband was constituted an officer of the Court, to collect the money for the Court in order that the Court might deal with it. It is not necessary for us now to determine what would be the relation between a husband and a co-respondent, if an order had been made by the Divorce Court that damages recovered against the latter should be paid to the husband for his own benefit. But *Ex parte Muirhead* (1) is a decision that, where an order, such as that in the present case, has been made for payment of the damages to the husband, he is constituted an officer of the Court to receive the damages on behalf of the Court. If that is the relation of the husband to the co-respondent, can it be said that

(1) 2 Ch. D. 22.

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he is, within the meaning of sub-s. 5 of s. 103, "a judgment creditor" of the co-respondent? I think that the words "judgment creditor" must be construed according to their ordinary meaning, unless there is something in the context or in the subject-matter which shews that they are used in a different sense, and I can see nothing which authorizes us to say that they are used in any but their ordinary sense. I think it is impossible to say that a person who is thus constituted an officer of the Court to collect a sum of money is a "judgment creditor" of the person who is to pay the money within the ordinary meaning of the words. Consequently, the application for a committal was not made by a "judgment creditor," and Cave, J., had no jurisdiction to make a receiving order in lieu of a committal, and his order is a bad one.

But under s. 5 of the Debtors Act the learned judge had power to deal with the case in the ordinary way. This seems to me to follow from *Linton* v. *Linton*. (1) The co-respondent owed the money; he was bound under an order of the Divorce Court to pay 1000*l*. It was shewn that, since the date of the order, he had been able to pay, not the whole 1000*l*., but a part of it, and that he had neglected to do so. That, in my opinion, brought him within the jurisdiction of the Court to commit him, or to make an order for the payment of the amount by instalments. I wholly reject the argument that if the debtor has not had the means of paying the whole sum which he was ordered to pay, though he has had the means of paying a part of it, the Court has no jurisdiction under s. 5 of the Debtors Act. He is bound to pay each pound of the sum which he is ordered to pay, and, if he neglects to pay any part of it which he is able to pay, he makes a default in obeying the order, and the Court has jurisdiction under s. 5 to deal with that default. I think that the proper order to make under the circumstances is that the appellant do pay 100*l*. within a month, and that he then pay 7*l*. 10*s*. per month until the whole 1000*l*. is paid.

BOWEN. L.J. I am of the same opinion. The question is whether Cave, J., had jurisdiction to make a receiving order in

(1) 13 Q. B. D. 239.

lieu of a committal, and this depends upon whether, under the special order of the Divorce Court, the husband is a "judgment creditor" of the co-respondent. The order was made under s. 33 of the Act 20 & 21 Vict. c. 85, and it provided in effect that the damages awarded against the co-respondent should be paid to the husband, but for the purpose only of settlement on the children of the marriage. Then we have the authority of *Ex parte Muirhead* (1), which, although it raised a different question, was decided upon grounds which are applicable to the present case. The decision in that case was, that, where such an order is made by the Divorce Court, no debt at law or in equity to the husband is created, but he is simply constituted the receiver of the Court for the completion of the order, and it is obvious that he could maintain no action at law or in equity in respect of the sum ordered to be paid to him. Whether that sum could be made the subject of proof in the bankruptcy of the co-respondent it was not then necessary to decide. If that be the true effect of the decision in *Ex parte Muirhead* (1), how can we say that a husband, for whom such a qualified advantage has been created for the benefit of his children, is a "judgment creditor" of the co-respondent within sub-s. 5 of s. 103? Turning to the Debtors Act, does it follow that all the persons who may apply under it for an order of committal are necessarily "judgment creditors"? Sect. 4 of the Act draws a distinction between the rights which may be enforced by imprisonment, but it in no way defines the persons who are to make the application; it confines itself to the definition of the offences which are to be punished. The power of committal given by s. 5 is for default in payment of any debt or instalment of any debt due in pursuance of "any order or judgment." At first sight one would say that many persons might apply under that section for a committal who did not strictly fill the character of a "judgment creditor." But still no one is entitled to a receiving order in lieu of a committal, unless he is a "judgment creditor" within the meaning of sub-s. 5 of s. 103 of the Bankruptcy Act. Sect. 103, and the subsequent order of the Lord Chancellor, transfers bodily to the Bankruptcy Court the jurisdiction under s. 5 of the Debtors Act which was previously vested in the High

(1) 2 Ch. D. 22.

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Ex parte Fryer. In re Fryer.

Bowen, L.J.

Court, and it has been argued that by the use of the words "judgment creditor" in sub-s. 5 it was intended to include in one compendious phrase all the persons who could apply for a committal under s. 5 of the Debtors Act, whether they were strictly speaking judgment creditors or not, and to empower the Court of Bankruptcy to make a receiving order on the application of any person who was entitled under the Debtors Act to apply for a committal. The first difficulty in the way of this construction is the broad one, that the section is a penal one, and we ought not therefore to go beyond the ordinary meaning of the words, unless we can see some strong reason for doing so. I confess that I can see no reason, except the argument that the words "judgment creditor" are used in a popular sense, as including all persons who could apply for a committal under the Debtors Act. But, if that was intended, the words "by a judgment creditor" would have been superfluous, and it would have been more apt to say at once that any one who could apply under s. 5 of the Debtors Act should be entitled to apply for a receiving order. I cannot help thinking that the sounder view is, that only a "judgment creditor" in the strict legal sense of the words was intended.

With regard to the order which ought now to be made, I agree that *Linton* v. *Linton* (1) is an authority that the husband is entitled to apply under s. 5 of the Debtors Act, though he is not a "judgment creditor" of the co-respondent, and I think that the proper order is that which the Master of the Rolls has stated.

Fry, L.J. The question is whether Cave, J., was right in making a receiving order. The order was made in Chambers, and he had not the advantage of hearing counsel. The application was made under s. 5 of the Debtors Act, and it is not disputed that the husband was entitled to apply under that section, or that it was competent for the judge to make an order for payment by instalments. The question is, whether he had power to make a receiving order in lieu of a committal. It has been argued that there was no jurisdiction to commit, because there was no evidence that the bankrupt had had the means of paying the whole sum which he had been ordered to pay. In my judg-

(1) 15 Q. B. D. 239.

ment it is not necessary to express any opinion on this point, but I do not intend to intimate that I in any way dissent from the view which has been expressed by the Master of the Rolls.

Then comes the question, whether sub-s. 5 of s. 103 applies to the present applicant; is he a "judgment creditor" within that sub-section? It is obvious that a judgment creditor can exist only when there is a judgment debt and a judgment debtor. The applicant has obtained from the Divorce Court an order directing the co-respondent to pay 1000*l.* into court, and that order was afterwards varied by directing him to pay the 1000*l.* to the husband "for the purpose of settlement upon the children of the marriage." The whole of the 1000*l.* is, therefore, to be held for the benefit of the children; the husband has no beneficial interest whatever in it. He has been appointed a collector in the name of the Court, and has no legal or equitable interest, except the obligation to receive the money and hold it subject to the order of the Court. We should be frittering away *Ex parte Muirhead* (1) if we were to hold that there was any distinction between the position of the husband in that case and the position of the applicant in the present case. I recognise the distinction between the question which arose in *Ex parte Muirhead* (1)—whether the husband could petition in bankruptcy against the co-respondent—and the present question, whether he is a judgment creditor—and I only refer to *Ex parte Muirhead* (1) as shewing the relation which exists between the husband and the co-respondent under such an order of the Divorce Court. I think that no debt in either a legal or an equitable sense was due from the co-respondent to the husband, and that the husband was not a "judgment creditor" of the co-respondent. Consequently, the contingency contemplated by sub-s. 5 of s. 103 had not arisen, and Cave, J., had no jurisdiction to make a receiving order. I agree that the order mentioned by the Master of the Rolls is that which we ought now to make. But I think that we ought to make no order as to costs.

Solicitors for appellant: *Crowders & Vizard.*
Solicitors for respondent: *G. Thompson & Son.*

(1) 2 Ch. D. 22.

W. L. C.

1886
Aug. 10, 11.

[IN THE COURT OF APPEAL.]

EX PARTE NORRIS. IN RE SADLER.

Bankruptcy—Secured Creditor—Amendment of Valuation of Security—Time —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., rr.* 12, 13.

By the Bankruptcy Act, 1883, Sched. II., r. 12 (*a*), where a security is valued by a creditor in his proof the trustee may at any time redeem it on payment to the creditor of the assessed value. By r. 13 a creditor who has valued his security may "at any time" amend the valuation and proof on shewing "to the satisfaction of the trustee, or the Court, that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation."

A secured creditor having stated in his proof the value at which he assessed his security, the trustee gave him written notice that "it was his intention" to redeem the security so valued, and thereupon applied for and received from the Board of Trade the amount required for such redemption. Before any further step was taken the creditor applied to amend his proof and valuation, the security having increased in value:—

Held, reversing the judgment of Cave, J., that nothing had occurred to prevent the amendment from being allowed.

Semble, that, upon the true construction of rr. 12, 13, the amendment could not be allowed after the trustee in the exercise of his right of redemption had paid the assessed value of the security to the creditor; and, that it could not be allowed after the trustee had, under r. 12 (*c*), elected to redeem the security at the assessed value.

APPEAL from the refusal of Cave, J., to allow E. T. Norris, a creditor of R. D. Sadler, a bankrupt, to amend the valuation which he had made in his proof of debt of a security which he held for his debt.

On the 12th of December, 1885, Norris lodged with the trustee in the bankruptcy a proof for a debt of 337*l.* 9*s.* 7*d.* The affidavit of proof stated that Norris held as security for his debt a policy of assurance for 200*l.* on the life of the bankrupt, and that he estimated the policy to be of the value of 21*l.* 7*s.* 9*d.*

On the 14th of December, the trustee wrote to the solicitors of Norris a letter in which, referring to Norris's proof, he said, "I beg to give you notice that it is my intention to redeem the policy valued in such proof at 21*l.* 7*s.* 9*d.*"

On the 19th of December, the trustee applied to the Board of Trade for a cheque for 21*l.* 7*s.* 9*d.*, to enable him to carry out the

purchase of the policy, and on the 24th of December he received from the Board a cheque for that amount. Meanwhile, on the 23rd of December, the bankrupt had died, and the policy thereupon became payable. On the 31st of December, Norris's solicitors wrote to the trustee saying, "We are instructed by him" (Norris) "to withdraw his proof, and we beg to do so accordingly." On the 1st of January, 1886, the trustee marked the proof as admitted, but he did not give any notice of this to Norris. On the 8th of January the trustee's solicitors wrote to Norris's solicitors stating that the trustee claimed to have the policy transferred to him for the amount of valuation. On the 24th of February, Norris's solicitors wrote to the trustee's solicitors that Norris insisted on his right to amend his valuation under r. 13 of Sched. II. to the Bankruptcy Act, 1883, and to retain the full amount of the sum assured by the policy. The trustee declined to assent to this, and Norris gave notice of an application to the Court for an order that he might be at liberty to amend his valuation of the policy by increasing it to the amount of the insurance, and to amend his proof accordingly.

July 5. Cave, J., refused the application with costs, on the ground that it was made too late.

Norris appealed.

Aug. 10. *Sidney Woolf*, for the appellant. Rule 13 of Schedule II. (1) to the Act entitles the creditor to amend his

(1) Schedule II., r. 11: "If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

Rule 12. "(*a.*) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value.

"(*b.*) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the Court may direct. If the sale be by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase.

"(*c.*) Provided that the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it

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valuation of his security "at any time" on shewing that the security has diminished or increased in value since its valuation. The rule does not limit the time within which the amendment may be made, and, whatever may be the implied limitations, the mere fact that the trustee has told the creditor that he intends to redeem the security at the amount of the valuation, nothing more having been done, cannot deprive the creditor of the right expressly given to him by r. 13. Rule 12 of Schedule I. does not apply to the present case, and there is no inconsistency between the provisions of the two schedules. Schedule I. applies to valuation for the purpose of voting at meetings of the creditors; Schedule II. applies to valuation for the purpose of receipt of dividends.

Pyke, for the trustee. The valuation by the creditor was equivalent to an offer by him to sell his security at the assessed value, and the trustee's letter of the 14th of December was an acceptance of that offer, and a contract, or quasi-contract, for the sale of the policy at that price was thus constituted.

The words "at any time," in rule 13 must be subject to some limitation, and, after the trustee has accepted the creditor's valuation, and stated his intention to redeem at that price, the right to amend the valuation is at an end. Clearly the creditor could not amend his valuation after the trustee had elected, under clause (*c*) of rule 12, to redeem the security. What has been done in this case amounts to an election by the trustee to redeem, though no notice was served on him by the creditor.

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to be realized, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued."

Rule 13. "Where a creditor has so valued his security, he may at any time amend his valuation and proof on shewing to the satisfaction of the trustee or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation, but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court."

The construction suggested of rule 13 would be inconsistent with rule 12 of Sched. I.

Aug. 11. Lord Esher, M.R. (after stating the facts). It was obvious that by reason of the death of the bankrupt the policy had increased in value. Thereupon the creditor gave notice that he desired to amend the valuation which he had put upon the policy. The trustee insists that the creditor was too late; the creditor insists that he came in time. Now that depends simply on the construction of the Act of Parliament and the rules made under it, which have the force of an Act of Parliament.

The 13th rule of the 2nd Schedule to the Act is that which deals with this matter, and the only question is, when is it too late for the creditor to act under that rule by amending his valuation and proof? The rule says that he may do so "at any time on shewing to the satisfaction of the trustee, or the Court, that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation." It is not pretended that there was any mistaken estimate in the present case, but the creditor has shewn to the satisfaction of the Court that the secu rity has increased in value since its previous valuation. Then the rule says that he may amend the valuation and proof "at any time," and we have no right to diminish the full force of those words "at any time," unless from the Act itself or the Rules we can find some necessary implication to limit the force of the words. That they are to have some limitation cannot, I think, be doubted; it cannot be that the right is to go on for ever. One necessary implication, at all events, I think is, that the right is at an end, if the trustee, acting upon the valuation put upon the security by the creditor, has exercised the right given to him by the 12th rule, to redeem the security "on payment to the creditor of the assessed value." It is impossible to suppose that, after the trustee has paid the amount of the valuation, and has thus on behalf of the general body of the creditors become the purchaser of the security, the creditor can undo all that. Is there any other implied limitation? I think there may be another with reference to the right which by clause (*c*) of rule 12 is given to

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Lord Esher, M.R.

the creditor to require the trustee to elect whether he will redeem the security. But no such limitation applies to the present case, for the conditions which give rise to that right of election do not exist. Therefore, the only limitation which could apply is this, that, after a trustee has paid the amount at which the security has been valued by the creditor, the creditor cannot re-open the transaction. But here the trustee, although he was ready to pay the 21*l.*, and intended to pay it, had not, in fact, paid it, and therefore the creditor comes within the words "at any time," subject to the only limitation which could possibly be put upon them. My learned Brother Cave felt great doubt as to the true construction of this rule. After consideration we are of opinion that the limitation is rather wider than he has held, and consequently the appeal must be allowed.

FRY, L.J. The question is, what is the true construction of rule 13 in Sched. II. to the Bankruptcy Act of 1883? It has been shewn that since the 12th of December the policy, which was then valued at 21*l.*, has greatly increased in value by reason of the death of the assured on the 23rd of December, and the question is, whether the creditor has lost the right of amending the valuation, which is given to him by rule 13, by anything which has happened in the meanwhile?

That which is relied upon is this, that on the 14th of December the trustee wrote to the creditor's solicitors, stating that it was his intention to redeem the policy at the value set upon it by the creditor. Now it is to be observed that rule 12 gives two rights. By sub-s. (*a*) it gives a right to the trustee "at any time to redeem the security on payment to the creditor of the assessed value." By sub-s. (*c*) it gives a right to the creditor, by notice in writing, to "require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized." It appears to me that those are correlative rights, the one being given to the trustee, the other to the creditor. It seems to me plain that, the moment the trustee has actually redeemed the security by payment, the right of the creditor to amend his valuation of the security must have come to an end, and the words "at any time" in rule 13 must

be limited to that extent. It seems to me also highly probable (though it is not necessary to determine that point now), that, if the trustee has elected to redeem, after a notice in writing by the creditor, under sub-s. (*c*) of rule 12, the rights of the parties may be then finally ascertained by the election, and that no alteration can afterwards be made in the valuation of the security. But in the present case the trustee has not paid the money; he has not, therefore, exercised the right of redemption given to him by clause (*a*) of r. 12. The creditor has not by a notice in writing under clause (*c*) required the trustee to elect whether he will redeem, and the trustee has not elected under that clause. All that he has done is to express an intention of exercising a right which he has not yet exercised. If appears to me, therefore, that nothing has happened which can in any way put an end to the right of the creditor under rule 13 to amend his valuation. Neither of the two things which the rules indicate, or may indicate, as finally determining the rights of the parties and putting an end to the right of amendment, has happened.

Two arguments, however, have been addressed to us to which, perhaps, I ought to refer. One of them was rather suggested by myself, viz.: that there would be an inconsistency between this construction and rule 12 in the 1st Schedule to the Act. On consideration, I think that that is plainly not so. The right of redemption given to the trustee by that rule depends upon the creditor's having made use of the proof in voting at any meeting, and the right of redemption is given on different terms. It involves the payment by the trustee of an extra 20 per cent., and it is not suggested that that right has been exercised in the present case, or that the circumstances under which it could be exercised have arisen. That point, therefore, may be laid aside.

The other argument was, that the proof and valuation and the statement of the trustee's intention to redeem constitute a quasi contract for redemption at that price, analogous, I suppose, to the contracts which have been held to result from notices to treat under the Lands Clauses Consolidation Act. I think that the analogy suggested is a false one. I think that the rules are not intended to create any rights before actual redemption or actual election by the trustee, and that the communication to the creditor of the trustee's intention did not create a contract or quasi contract for

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redemption of the policy. The only thing (other than actual payment) which could give any right to the trustee, would be the service on him by the creditor of a notice under rule 12 to elect, followed by an election by the trustee to redeem. For these reasons I am unable to agree with the view of Cave, J., and I think that the appeal must be allowed.

BOWEN, L.J. It seems to me that rule 12 in Sched. II. must be construed quite independently of rule 12 in Sched. I. I entertain no doubt as to that. The two schedules derive their sanction from two different sections of the Act, and the subject-matters with which they deal are entirely distinct. The 1st Schedule derives its virtue from s. 15 of the Act, which provides that, "with respect to the summoning of and proceedings at the first and other meetings of creditors, the rules in the 1st Schedule shall be observed." Under the 12th rule in that schedule it is true that the revaluation of a security by a creditor is limited to such time as shall have elapsed before he has been required to give up his security. But the obligation of the creditor under that rule to give up his security, on payment of the value which he has set on it, plus 20 per cent., depends upon his having made use of his proof in voting at any meeting of the creditors. The rights of redemption and revaluation of a security are there parts of a rule which is made for the purpose of regulating the procedure at or in relation to the first and other meetings of the creditors. The 2nd Schedule derives its validity from a different section of the Act altogether, s. 39, which provides, that "with respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the 2nd Schedule, the rules in that schedule shall be observed." When we turn to that schedule we find that by rule 13 a creditor who has valued his security "may at any time amend the valuation and proof on shewing that the security has diminished or increased in value since its previous valuation," words which primâ facie give him an unlimited power of amendment and revaluation. It has been suggested that there is something in the preceding rule, or in the conduct of the parties under it in the present case, which has deprived the creditor of the right to avail himself of

this large and liberal power of amendment. It is said that the letter written by the trustee, in which he intimated that he intended to redeem the policy on payment of the assessed value, is such a step taken in the proceedings in the bankruptcy as deprives the creditor of the large power given to him by rule 13. Looking back to rule 12, it appears that the trustee may at any time redeem the security on payment to the creditor of the assessed value, but there is a total absence of any provision that he may deprive the creditor of his right under rule 13 by taking a step falling short of payment, viz. by giving notice of an intention to pay. The creditor's right to put the trustee to his election, "whether he will or will not exercise his power of redeeming the security or requiring it to be realized," depends upon the creditor's giving notice in writing to the trustee, and this election must be made by the trustee within six months after receiving the notice. But, unless that notice is given by the creditor, the trustee is not put to his election. It is quite possible, no doubt, in this as in other cases, that a person who has a statutory power of choice which is unlimited in its terms, may nevertheless so conduct himself, or allow other persons who are dealing with him to place themselves in such a position, as to render it unjust that he should afterwards do that which the statute says that he may do at any time. But in the present case there has been nothing of that sort; nothing has taken place between the parties which in any way estops or precludes the creditor from exercising this power of amendment. It has been suggested that by the valuation the creditor had altered his position in the same sort of way that a company alters its position by serving notice to treat under the Lands Clauses Act; that the valuation was in the nature of a statutory offer which was accepted by the trustee. There is nothing in the Act to justify that view, and nothing in the ordinary conduct of business to shew that it ought to be adopted. It seems to me that we are perfectly right in maintaining for the creditor the power which the statute gives him.

Solicitors for creditor: *Hollams, Son, & Coward.*
Solicitors for trustee: *Irvine & Hodges.*

W. L. C.

1886
July 2.

[IN THE COURT OF APPEAL.]

WEBSTER *v.* FRIEDEBERG.

Practice—New Trial—Verdict against Weight of Evidence—Principle on which new Trial allowed—Report of Judge.

A new trial of an action ought not to be granted on the ground that the verdict was against the weight of evidence if the verdict was one which the jury, acting as reasonable men, could have found.

Solomon v. *Bitton*, (8 Q. B. D. 176) explained.

Appeal by the plaintiffs against an order made by a Divisional Court (Lord Coleridge, C.J., and Bowen, L.J.) for a new trial of the action.

The action was for the specific performance of an agreement for a lease, and to recover damages for breach of the agreement.

The jury found a verdict for the plaintiffs, with 25*l.* damages.

The defendant moved for a new trial, on the ground that the verdict was against the weight of evidence, and Grove, J., who tried the action, reported to the Court that he was dissatisfied with the verdict.

The Divisional Court (Lord Coleridge, C.J., and Bowen, L.J.) made an order for a new trial.

The plaintiffs appealed.

Kemp, Q.C., and *Levett*, for the plaintiffs.

Boome, (*Henn Collins, Q.C.*, with him), for the defendant.

The case is reported solely for the observations made by the Court of Appeal upon *Solomon* v. *Bitton*. (1)

Lord Esher, M.R. (after stating that it must be taken from the report of Grove, J., that the verdict of the jury was one which they, acting as reasonable men, could not have given, and that the order of the Divisional Court must be affirmed, continued:—) Some remarks have been made on *Solomon* v. *Bitton*. (1) I was a member of the Court when the judgment in that case was delivered, and I certainly did not then think that anything which

(1) 8 Q. B. D. 176.

was said by Jessel, M.R., was contrary to my own previous opinion about that practice.' I am quite certain that the other judges of the Court of Appeal consulted me before the judgment was delivered. The report states that the question whether a new trial should be granted on the ground that the verdict was against the weight of evidence depends upon whether the verdict was such as reasonable men ought to have come to. As the report stands, there may possibly be some doubt as to what was intended. But my Brother Fry has told us that Jessel, M.R., considered that the language which he then used was not correctly reported, and that the word "not" should be inserted after the word "ought." In future, when that case is referred to, we shall read the judgment as if it ran, "such as reasonable men ought *not* to have come to," and I have corrected the Court copy accordingly. In *Metropolitan Ry. Co.* v. *Wright* (1) Lord Selborne (in the Court of Appeal) stated the rule as I had always supposed it to be, and the House of Lords took exactly the same view. There is really no difference between any of the judges or any of the Courts on this question. But it is idle to say that, in determining whether a verdict was against the weight of evidence, you must not take into serious consideration the opinion of the judge who tried the case. No one has ever said that his opinion is conclusive, but it is a matter to be taken into serious consideration.

FRY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Wood, Bird, & Wood.*
Solicitor for defendant: *H. H. Myers.*

(1) 11 App. Cas. 152.

W. L. C.

1886
May 14, 17.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE SCHOOL BOARD FOR LONDON.

Poor-rate—Rateable Value—Assessment of Schools—Hypothetical Tenant—School Board—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 4.

In assessing to the poor-rate schools occupied by a School Board, which can make no profit in a commercial sense as tenant of the schools, the School Board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the Board might reasonably be expected to pay for the premises for use as schools.

Appeal by the London School Board from the judgment of Cave and Wills, JJ., in favour of the respondents, the assessment committee of the parish of Saint Leonard's, Shoreditch, on a special case stated by justices assembled in general assessment sessions.

The facts stated in the special case, so far as they are material to the point decided by the Court of Appeal, are as follows:

The School Board, under and by virtue of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and the Acts amending the same, had acquired certain land and premises situate in St. John's Road, Hoxton, in the parish of St. Leonard's, Shoreditch, consisting of schools, caretaker's house, and playgrounds.

The schools were frequented by children of any class, who received instruction at certain fees fixed by the School Board under s. 17 of the Elementary Education Act, 1870.

In the supplemental valuation list the schools were assessed at 1150*l.* rateable value. This assessment was arrived at by calculating the annual value of the land at 4 per cent. on its original cost, and the annual value of the buildings at 5 per cent. on their then estimated cost.

At the hearing before the court of general assessment sessions, it was proved that the price paid for the land and buildings was fair and reasonable, and that there had been no extravagance or unnecessary outlay, that profit in a commercial sense could not be made by the School Board as tenant of the schools, and that if the schools were then in the market to be

let to a tenant as schools, subject to the restrictions imposed by the Education Department acting under their statutory powers, a tenant could not be found who would be willing to take them.

The court of general assessment sessions being of opinion that the School Board ought not to be excluded from the number of hypothetical tenants who might be willing to rent the premises, decided in favour of the contentions of the respondents, but reduced the rateable value to 1100*l.*

The Divisional Court decided in favour of the respondents, affirming the order of sessions.

Charles, Q.C., and *Marriott, Q.C.* (*Ram*, with them), for the School Board, in support of the appeal. The Assessment committee were wrong in treating the School Board itself as a possible hypothetical yearly tenant. By the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 4, "The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament," &c., and the rateable value is to be calculated from the gross value by making certain deductions. The tenant there spoken of does not mean the owner, but means any tenant whose occupation would be beneficial in the sense of producing a profit. Here the case shews that the premises are incapable of beneficial occupation by the School Board.

Jelf, Q.C., and *Castle*, for the respondents. The words "a tenant" in the Act mean any tenant, and are wide enough to include the School Board. There is nothing in the terms of the Act to exclude from the calculation an owner who is in occupation of the premises. It is not necessary that the tenant should be able to make a profit in a commercial sense. If it were many premises would be altogether exempt.

Charles, Q.C., replied.

The following cases were cited:—*Reg.* v. *West Middlesex Waterworks Co.* (1); *Metropolitan Board of Works* v. *Overseers of West Ham* (2); *West Bromwich School Board* v. *Overseers of West Bromwich* (3); *Mersey Docks and Harbour Board* v. *Overseers of Llanei-*

(1) 1 E. & E. 716; 28 L. J. (M.C.) 135. (2) Law Rep. 6 Q. B. 193.
(3) 13 Q. B. D. 929.

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THE QUEEN v. SCHOOL BOARD FOR LONDON.

lian (1); *Reg.* v. *South Staffordshire Waterworks Co.* (2); *Dewsbury and Heckmondwike Waterworks Board* v. *Assessment Committee of Penistone Union.* (3)

LORD ESHER, M.R. The main and real question to be decided in this case is whether, in calculating the rateable value of the schools in question, the School Board itself ought to be taken into account as one of the possible hypothetical yearly tenants. The point that the School Board is not rateable was suggested, but was not seriously pressed. The buildings are not put into such a position by statute that they could not profitably be occupied or owned by any one; they are not (as it has been described) struck with sterility, and are therefore rateable, and the School Board can be rated in respect of them. The real question is how the value is to be ascertained. The inquiry is not as to what rent is paid by the actual occupier. The mode of finding out the value is laid down in the Act, and it is to ascertain the rent which *a* tenant (not *the* tenant), taking one year with another, might reasonably be expected to pay; it is also implied that where the owner occupies he is to be considered as if he were a tenant. The directions given by the Act are equivalent to saying that one must look at all possible tenants, and the phraseology does not exclude an owner who himself occupies the premises. Therefore an owner in occupation of the premises is not excluded from consideration as a possible tenant. Now the School Board can be tenant of premises. If by the terms of any statute it could not legally be tenant it would be excluded from the calculation. It is said that the School Board ought to be excluded because it can never obtain any beneficial interest from its tenancy; but it can be a tenant; it has a duty to perform which may induce or force it to be a tenant. It follows therefore that it would be wrong to exclude the School Board from the list of possible hypothetical tenants, whether it is in the position of owner or in that of occupier. That is the real question of principle, and is the question which was intended to be argued. The calculation is founded on this, that the Court took the School Board as a possible tenant. They

(1) 14 Q. B. D. 770. (2) 16 Q. B. D. 359.
(3) 16 Q. B. D. 585; 17 Q. B. D. 384.

took the right view, and calculated the rent which could be expected from any tenant, including the School Board. I am of opinion that the judgment of the Divisional Court ought to be affirmed.

BOWEN, L.J. I am satisfied that the real, and, indeed, the only, question for decision is whether the School Board is to be excluded from the list of possible hypothetical yearly tenants. To decide this it is necessary to refer to the Act of Parliament, and on doing so it seems to me that there is no more mystery.

By 6 & 7 Wm. 4, c. 96, s. 1, and 32 & 33 Vict. c. 67, s. 4, the rate is to be made upon an estimate of the rent at which the premises might reasonably be expected to let from year to year; that must mean to let to some one who wants to hire them. The question is whether the School Board is to be excluded from the list of possible occupiers. If the inquiry is made whether it might reasonably be expected that the premises would be let to the School Board, the answer must be in the affirmative. That being so, it seems impossible to exclude the School Board. Therefore the language of the Act answers the question. The case cannot fairly be decided on the hypothesis that the one person who wants the premises most would not take them. It does not matter whether the School Board wants the premises for the purpose of profit, or will make profit out of them; the question is whether the School Board wants and would take them. I am satisfied that the principle on which the value has been estimated is sound.

FRY, L.J. I am of the same opinion. I think the difficulty arises from referring, not to the Act itself, but to certain expressions which occur in the decisions.

The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), in s. 4, defines "gross value" as meaning "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament," &c. That refers to the annual rent which any tenant might reasonably be expected to pay to any landlord, and the actual owner and occupier are not excluded. The question was asked why the actual occupier is

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not to be treated as a possible tenant, and no answer has been given except one. It is said that the School Board is not to be considered as a possible tenant, because, though it occupies the premises, it can make no profit out of them, but a man who occupies a house for his own comfort might as well be excluded. The term "sterility" has been introduced into the cases, because as a general rule a profit is produced, but it does not by any means follow that because there is no profit there is no value. There could be no better illustration of this than the present case. The only question is whether the person to be considered as a tenant could reasonably be expected to take the premises from any motive. It seems to me that the very words of the section answer the question, and that the argument for the appellants is derived from a misapprehension of suggestions which have been made in the cases. I am of opinion that the right mode of calculating the value has been adopted.

Appeal dismissed.

Solicitors for appellants: *Gedge, Kirby, & Millett.*
Solicitors for respondents: *Mills, Lockyer, & Mills.*

P. B. H.

[IN THE COURT OF APPEAL.]

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July 11.

IN RE POPE.

Judgment Creditor—Receiver—Land subject to Equitable Mortgage—23 & 24 Vict. c. 38—27 & 28 Vict. c. 112—Non-registration of Order appointing Receiver.

Since 27 & 28 Vict. c. 112, where land has been actually delivered in execution by writ of elegit or other lawful authority, it is unnecessary to register the judgment, writ, or other process of execution except for the purpose of obtaining under s. 4 of the Act a summary order for sale; but before any creditor to whom any land of his debtor shall have been actually delivered in execution can obtain such summary order his writ or other process of execution must be duly registered pursuant to s. 3 of the Act.

An order for the appointment of a receiver is a "process of execution" within the meaning of the Act.

APPEAL from an order of A. L. Smith, J., in chambers, made upon the application of M. Pope, and setting aside the appointment of a receiver so far as it related to a piece of unoccupied freehold land near Barnes Terrace, Surrey.

It appeared that the owner of the premises in question, which were subject to an equitable mortgage by deposit of deeds, had sold and conveyed his equity of redemption to Pope. Before the sale a creditor of the vendor had obtained and registered a judgment against him, and had issued an elegit as upon land in Middlesex. The only lands which the vendor had were in Surrey, but as these lands comprised the premises in question, which were subject to the equitable mortgage, the judgment creditor, instead of issuing an elegit as against land in Surrey, obtained an order for the appointment of a receiver by way of equitable execution. The judgment creditor not having registered the order appointing the receiver, Pope applied at chambers to set aside the appointment so far as regarded the premises in question. A. L. Smith, J., granted the application upon the ground that the order appointing the receiver ought to have been registered under 23 & 24 Vict. c. 38, and that in default of such registration the subsequent bonâ fide purchaser for value of the equity of redemption had the better title.

The judgment creditor appealed.

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June 4. *R. O. B. Lane*, for the judgment creditor. The order for a receiver was equivalent to execution, and was a substitute for the more cumbrous proceeding by elegit.

[He referred to 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112, ss. 1, 3, 4, 6; and to *Hatton* v. *Haywood*. (1)]

Ingpen, for Pope. The legal estate being in the judgment debtor it was necessary, in order to give the judgment creditor priority over the purchaser, either that the land should have been extended under an elegit or that the order appointing the receiver should have been registered under the Acts.

Cur. adv. vult.

June 11. The judgment of the Court (Day and Wills, JJ.), was delivered by

WILLS, J. The question presented to us is of considerable difficulty. In arriving at the conclusion which we have embodied in the following judgment, we have been greatly helped by the arguments addressed to us by Mr. Lane and Mr. Ingpen, to both of whom we desire to express our acknowledgments for the assistance they have rendered us.

The expression "affect land" appears to us to be a synonym for the creation of an equitable charge. It first appears in 1 & 2 Vict. c. 110, s. 19, and a comparison of that section with s. 13 of the same Act makes this proposition clear.

In the Act of 1 & 2 Vict. c. 110, it is the judgment only that is spoken of as "affecting" the land. In the 23 & 24 Vict. c. 38, ss. 1 and 2, the execution is spoken of as capable of "affecting" it. But the word itself does not appear to have undergone any change of meaning either there or in 27 & 28 Vict. c. 112. The provisions of ss. 4 and 6 of the last-mentioned Act shew clearly enough that the original meaning of the word was in the mind of the framer of that Act.

The whole of this legislation appears to us to leave untouched the effect of a completed execution, whether by legal or equitable process. It refers only to cases in which the creditor seeks to enforce by the aid of the Court a charge upon the land. In the

(1) Law Rep. 9 Ch. 229, 236.

case of legal execution, the return of the writ of elegit vests the legal estate in the creditor, and enables him to maintain ejectment if the debtor's interest be in possession, to sue for the rent if the debtor's interest be in reversion upon the determination of a tenancy: *Hatton* v. *Haywood.* (1) He would then need no aid from the Court, nor have any occasion to look to his judgment or writ of execution as constituting a charge or "affecting" the land within the meaning of the legislation under discussion; and he would therefore have no occasion to register his judgment or his writ; nor could his failure to do so defeat his legal title, or give priority to a subsequent purchaser, though for value and without notice.

The appointment of a receiver is, in our opinion, the equivalent of the execution of the writ of elegit: it amounts to a "delivery in execution." That it does so within the meaning of 27 & 28 Vict. c. 112, is past discussion, since the decision in *Hatton* v. *Haywood* (1), *Anglo-Italian Bank* v. *Davies* (2), and *Ex parte Evans, In re Watkins.* (3) The reasoning by which in those cases the proposition is supported, appears to us to shew that, apart from the statutes in question, the effect of an order appointing a receiver is not merely to put the execution-creditor in such a position that he may go to the Court for a further order to sell the property in his capacity of a person having a charge,—in which case he would certainly need to register his writ (by virtue of 27 & 28 Vict. c. 112), but also to operate as a completed execution. To the fruits of that execution, so long as they are confined to the unaided effect of the process of execution, the execution-creditor is entitled by the order of the Court already made; and he cannot be deprived of them by the act of the debtor any more than he could if he had the legal estate. The analogy between his position and that of the tenant by elegit is complete, because the tenant by elegit, if he wanted to do more than enjoy the benefit of the land until his debt was paid, would be obliged to treat the judgment or the execution as a charge, and to resort to the Court for help; in which case he would have to register his judgment and writ of elegit just at much as would

(1) Law Rep. 9 Ch. 229, 236. (2) 9 Ch. D. 275.
(3) 13 Ch. D. 252.

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the creditor who had obtained his equitable execution have to register the judgment and the order appointing the receiver. In either case he would have, in order to obtain the benefit of the Acts in question, to register his judgment, to issue execution within three months after such registration (23 & 24 Vict. c. 38, s. 1), and to register his writ of execution,—though no time, as far as we can see, seems to be limited for the registration of the *writ*: and as the priorities date, not from the *registration* but from the *execution* of the writ (27 & 28 Vict. c. 112, s. 6), it is difficult to see that the registration of the *writ* is more than a formality. It may be effected apparently at any time; and it would seem to be equally available under the 27 & 28 Vict. c. 112, whether made immediately after execution executed, or only an hour before applying to the Court for an order of sale.

It is true that in the cases cited, and in those referred to in the judgments in those cases, the reason why equitable execution was resorted to was that there was a legal impediment in the way of legal execution which rendered legal execution impossible, whilst in the present case it only renders it highly inconvenient. We cannot think that this circumstance can make the execution of less effect in the one case than in the other: and we are glad to be able to adopt a view which is free from the anomaly of making the order of the Court by which the payment of a debt is enforced of less avail because it is derived from the equitable jurisdiction of the Court than it would have been had it been derived from the jurisdiction at common law.

The distinction between the enforcement of a charge and the operation of an order appointing a receiver as the equivalent to legal execution is stated very clearly in the judgment of Cotton, L.J., in *Anglo-Italian Bank* v. *Davies*. (1) In the same case Brett, L.J., points out that the jurisdiction to appoint a receiver pending legislation is not affected by 27 & 28 Vict. c. 112, which was passed for another purpose. We think it follows by parity of reasoning that the effect of the appointment of a receiver, not as a step to the enforcement of a charge, but as a means of realizing a debt, has not been affected by the statutes in question.

(1) 9 Ch. D. 275, 290.

We are therefore of opinion that this appeal must be allowed, and the order rescinding the appointment of a receiver discharged; and that the respondent must pay the costs here and below.

Order accordingly.

J. S.

Pope appealed to the Court of Appeal.

Ingpen, for Pope. As the interest of the debtor in the land was a legal interest, the creditor might have got legal execution through the issue of an elegit. This is a case in which prior to the Judicature Act, the Court would not have appointed a receiver, upon the principle of declining to lend its assistance to a creditor who already has a legal remedy: *Anglo-Italian Bank* v. *Davies* (1); *Ex parte Evans, In re Watkins* (2); and all that the Judicature Acts did was to enable a creditor to obtain equitable execution without a new action; thus merely giving him a more speedy remedy, and leaving the principles on which the relief is granted exactly the same. Accordingly although since those Acts the Court may have had the jurisdiction to appoint the receiver, it ought not, under the circumstances of this case, to have exercised it.

Secondly, as against a bonâ fide purchaser for value, an equitable execution by the appointment of a receiver is, since 23 & 24 Vict. c. 38, no charge upon the land unless the order appointing the receiver is registered.

Under 1 & 2 Vict. c. 110 (an Act for extending the remedies of creditors), s. 11, all the lands of a judgment debtor may be delivered in execution under a writ of elegit. By s. 13 a judgment is to operate as a charge on the real estate of the debtor enforceable in a Court of Equity after one year; and by s. 19 no judgment shall by virtue of that Act affect any lands as to purchasers unless it is registered in the name of the debtor.

Under 2 & 3 Vict. c. 11 (whereby the dockets required by 4 & 5 Wm. & M. c. 20, for the protection of purchasers were closed), s. 4, judgments were to be re-registered every five years, so that search beyond five years became unnecessary; and by s. 5 protection was given to purchasers without notice.

Then by 3 & 4 Vict. c. 82, s. 2, a purchaser with notice was not

(1) 9 Ch. D. 275, 283. (2) 13 Ch. D. 252.

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to be affected unless the judgment had been registered; by 18 & 19 Vict. c. 15, the previous Acts are further explained; and by 23 & 24 Vict. c. 38, a further obligation is imposed upon the judgment creditor, in order to enable purchasers and others to ascertain when execution has issued; for it is enacted by s. 1 that no judgment shall affect any land as against a bonâ fide purchaser, unless a writ "or other due process of execution of such judgment" shall have been issued and registered and put in force within three months; and by s. 2 such registration is to be in the name of the creditor. This Act has never been repealed, and as an order appointing a receiver is a due process of equitable execution, it must be registered, for although 27 & 28 Vict. c. 112 required (s. 1) that the land must be actually delivered in execution, and it was held in *Hatton* v. *Haywood* (1) that equitable execution by the appointment of a receiver is delivery in execution within that statute, yet as s. 1 of 23 & 24 Vict. c. 38, still remains in force, the creditor must register the order appointing the receiver before the land can be affected.

R. O. B. Lane, for the judgment creditor. Upon the first point.—Since the Judicature Acts there is no limit to the power of the Court to appoint a receiver, and the lands being subject to an equitable mortgage the appointment was the proper course to adopt.

Upon the second point, under 27 & 28 Vict. c. 112, a judgment is no longer a charge on land unless the land is actually delivered in execution; so that a legal title by seizure is substituted for the charge by judgment. But there is nothing in the Act to cut down the effect of or to attach any condition precedent to a taking of the land in execution; and a receivership gives possession analogous and tantamount to a completed execution under a writ of elegit. Per Cotton, L.J., in *Anglo-Italian Bank* v. *Davies* (2): "The appointment of a receiver is now delivery of execution by lawful authority within the meaning of the Act of 27 & 28 Vict. c. 112." There is no necessity therefore for registering the order appointing a receiver in such a case: *Whitworth* v. *Gaugain* (3); *Pease* v. *Fletcher* (4).

Ingpen, in reply.

(1) Law Rep. 9 Ch. 229.
(2) 9 Ch. D. 293.
(3) 1 Ph. 728.
(4) 1 Ch. D. 273, 275.

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COTTON, L.J. This is a question of considerable importance. Two points have been taken. It was said first of all that the Court had no jurisdiction to grant a receiver in a case like this where the judgment creditor might have got an elegit. To say that there was no jurisdiction is hardly a proper expression. The real question is, whether the Court ought under the circumstances in this case to have granted a receiver. Before the Judicature Act a judgment creditor would have had great difficulty in getting a Court of Equity to grant a receiver under circumstances like these. For the Court of Equity always acted on the principle that it would never grant a receiver where the party applying for the receiver had a legal right to the possession. An equitable mortgagee could get a receiver, but a legal mortgagee never did get a receiver until the passing of the Judicature Act.

But then although a case is required to induce the Court to grant a receiver, yet the practice of the Court as regards granting receivers was greatly altered by the 8th sub-division of the 25th section of the Act of 1873: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." Since the passing of that Act it has been a usual practice for the Chancery Division to grant a receiver at the instance of a legal mortgagee just as it formerly did at the instance of an equitable mortgagee. Because although a legal mortgagee has power to take possession, and can do so without the assistance of a Court of Equity, yet there are obvious conveniences in granting a receiver, so as to prevent a mortgagee from being in the very unpleasant position of a mortgagee in possession; and that has been constantly done. What the Court of Chancery did up to the time of the Judicature Act was that, when there was difficulty in the way of a judgment creditor getting possession by process of law, and, after he had tried to get possession by legal process, if he failed, then the Court interposed by granting a receiver, which was then considered and was in fact the proper course to adopt. But in my opinion, as this section enables the Court of Equity to depart from its former practice and to grant a receiver,

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not only where there is no power to take possession at law, but where there is power to interfere, if it is just or convenient that an order for a receiver shall be made, then, in my opinion, if it was just or convenient, the Court in this case had power to grant a receiver, though undoubtedly the judgment creditor could by elegit have got possession. But if he had got possession he would have done so subject to being interfered with by the prior mortgage, and that would have thrown great difficulty in the way of his working out his possession by elegit, and the interest which he could get by elegit.

It is true that as against the debtor the elegit would have been enforceable, and the judgment creditor would have had a right as against him to proceed for the rents and profits, but then there was the equitable mortgagee, at whose instance the Court of Equity would have interfered in order to prevent the elegit from being put in force so as to prejudice the rights of a prior mortgagee. So I think that objection cannot prevail, and we must take it that the Court had the power to grant a receiver and was right in exercising it.

But then it is said that the order appointing the receiver ought to have been registered, and that argument has been pressed upon us very fully and ably. The question turns on the statutes 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, and is whether the registration required by the earlier Act is still necessary in order to give a charge on land to be enforced by a receiver. I think it is not. Up to the 23 & 24 Vict. c. 38, there were provisions that a judgment should not affect lands unless it was registered. The 23 & 24 Vict. c. 38, added the provision that a judgment should not affect lands until execution had been issued, and the judgment and writ of execution should both be registered. For the 1st section of that Act provides that lands shall not be affected as regards purchasers for value, although a writ or other due process of execution shall have been issued and registered, unless such writ or process of execution shall have been put in force within three calendar months from the time when it was registered.

That was another protection to purchasers. But the provision which rendered registration necessary was not merely in order to

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prevent land being affected where there was no execution of the judgment or of the writ, but in order that it might not be affected by a judgment or writ where there was no registration.

Then we come to the 27 & 28 Vict. c. 112, upon which the question turns, because it contains something further in favour of the purchaser. That Act says, that no judgment or writ shall affect land until the land has been actually delivered in execution by virtue of a writ of elegit, or other lawful authority. It therefore took away altogether the power to affect land by a judgment or by a writ not executed. But did it require that where a writ had been executed, and where the land had been actually delivered in execution by virtue of the writ, that that writ must be registered in order to affect a purchaser? I think not. The registration was required when there had been no delivery of the land by the writ being executed; but this section does not require that. The registration required by the previous Act was where land was to be affected by judgment or writ not executed. Here the enactment is that that shall never affect land at all, and, judging only by the 1st section, I should say that what this registration was required for in the previous Act does not apply to that which alone was to affect land under this later Act. When the land was delivered by elegit, on the return of the writ, the creditor was in legal possession of the land, and in that case was not intended, in my opinion, to be subject to this further fetter—that the writ must be registered in order that the legal title so acquired in the land should be made effectual. I need not go into the difference between an actual writ of elegit and an order for a receiver, because it was decided in *Hatton* v. *Haywood* (1), which has been referred to, that where there has been a receiver appointed under a judgment that that is equivalent to, and in law is, delivery of the land under lawful authority, just in the same way and to the same extent as if there had been an elegit, and the creditor had been in legal possession by virtue of the elegit. The view I take of s. 1 is, to my mind, assisted by the words of s. 3, which, reading it shortly, provides—that every writ or other process of execution of any such judgment . . . . shall be registered. In my opinion it is hardly possible to suppose

(1) Law Rep. 9 Ch. 229.

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that there was to be any registration under the Act of 23 & 24 Vict. which was to apply to writs under which land has not been actually delivered in execution, and a registration as regards writs under which land shall have been actually delivered in execution; but this s. 3, on its fair construction, only applies to writs by virtue whereof land shall have been actually delivered in execution, a matter which cannot be ascertained until after there has been actual delivery in execution. I can quite see why this section required registration; in order that an application for a summary order for sale might be made under s. 4. Undoubtedly no application for sale could be made under s. 4 unless the writ or other process of execution had been registered under s. 3; but why that was so one can hardly see. This s. 3 points to the time when it is necessary to register the writ or other process of execution, viz., after the land "shall have been actually delivered in execution." In my opinion, therefore, the second objection that the order for the appointment of a receiver does not affect a purchaser unless it has been registered, cannot prevail.

Holding this view, one cannot but feel the difficulty imposed upon purchasers; but it is not for this Court to cure it. It is for the legislature, if it thinks fit to extend these Acts, so to do. I do not think it right to give an unnatural construction to the words of the Act, or to say what would be the better Act to pass. That is a matter for the legislature, with which we ought not to interfere.

LINDLEY, L.J. I am of the same opinion. No doubt there is a certain amount of obscurity about these Acts, and it is not, I admit, easy to put any construction upon them which is not open to objection or does not give rise to some difficulty; but the question really comes to this, whether first of all it was right to make this order for a receiver at all; and secondly, whether the purchaser is entitled to have it discharged. [The Lord Justice then stated the facts of the case, and after remarking that it was not necessary for the Court to decide what, if any, good the registration of his judgment had done the judgment creditor, continued.] Under those circumstances it appeared to the judgment creditor that it would be better to obtain an order for

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a receiver than to issue an elegit, and, considering how excessively difficult it is to work out the rights of a judgment creditor under an elegit when there are prior equitable incumbrances, it appears to be a case of all others for the appointment of a receiver, and it certainly falls distinctly within the section of the Judicature Act, 1873. In fact, one's own experience shews that the quickest course was not to have issued a writ of elegit under those circumstances, but to have obtained a receiver, and therefore the order was right enough both as regards expediency and expedition. Now the order for the appointment of the receiver was not registered.

Whether the receiver did or did not actually take possession of the piece of land before the purchaser bought it from the judgment debtor, the Court is not in a position to say. It is asserted on the one hand that he did, and on the other that he did not. We have not the real facts before us. But on the 18th of July, after the receiver had been appointed, the judgment debtor conveyed this piece of land to Mr. Pope, who claims to be a purchaser for value without notice, and to have the legal estate, and comes to the Court for a discharge of the receiver. He contends that, assuming it to be a case in which a receiver might have been appointed, he is entitled to the order he now asks because the order for the appointment of the receiver has not been registered. Upon this question it is necessary to look closely at and consider the terms of the Acts 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112. They certainly do not seem to be very skilfully drawn, and the second Act in particular appears to have been drawn in order to patch up the defects in the first. The 23 & 24 Vict. c. 38, starts with a recital that "it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates in respect of judgments, statutes, and recognizances as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary, or leasehold, to ascertain when execution has been issued on any judgment, statute, or recognizance, and to protect them against delay in the execution of the writ." Then with that view it is enacted that "no judgment to be entered up after the passing of this Act shall affect any land as

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to a bonâ fide purchaser for valuable considerable, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment) unless a writ or other due process of execution of such judgment shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him." One sees from that that the real object was to prevent the issuing of writs and the non-execution of them. It was to protect purchasers from that state of things. Then comes the 27 & 28 Vict. c. 112, another statute passed in the same direction, although it goes further, the preamble of which is as follows: "Whereas it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments." Therefore both Acts appear to have for their object the assimilation, more or less, of executions against lands, and executions against chattels, so far as the protection of purchasers is concerned. That throws a little light on the later statute. Then, having stated that as the object, it is enacted that "no judgment . . . to be entered up after the passing of this Act shall affect any land until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment." Then s. 3 says that "Every writ or other process of execution" (which I agree would include a receiver) "of any such judgment by virtue whereof any land shall have been actually delivered in execution, shall be registered," in the manner provided by the 23 & 24 Vict. c. 38, but then it goes on, "but in the name of the debtor against whom such writ or process is registered instead of as under the said Act in the name of the creditor." Then comes a clause which is extremely important: "And no other or prior registration of such judgment . . . shall be or be deemed necessary for any purpose."

Now, we have to put that language together and see what its effect is on the 1st section. It does not profess in terms to repeal it, but it does seem to make it obsolete in nearly all cases. I have a difficulty in seeing a case in which it would not be so; because it comes to this—that you do not want any registration of any judgment at all. All you want is the registration provided

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by s. 3; and s. 1, which says that no judgment and so on, shall affect any land unless such land shall have been actually delivered in execution appears to me to come to this, that a judgment creditor, who has got his land in execution is safe enough. It is contended that the judgment creditor must register his writ. The effect of that must be that he must register not only his writ, but, if he wanted an order for sale under s. 3, he would have to re-register under that section, as has been pointed out by Cotton, L.J. It seems to me that the view taken by the purchaser's counsel is not correct, but that that taken by Wills, J., is—namely, that when the land has been actually delivered in execution it is safe so far as these statutes are concerned. That must, I think, be the ultimate termination of the somewhat difficult controversy arising upon these two Acts of Parliament. It seems to me, therefore, that the appeal ought to be dismissed.

Solicitor for Pope: *M. H. Pope.*

Solicitor for the judgment creditor: *Tickell.*

W. W. K.

[IN THE COURT OF APPEAL.]

Aug. 6.

EX PARTE IDE. IN RE IDE.

Bankruptcy—Bankruptcy Notice—Final Judgment against Partnership Firm—Partner against whom Execution cannot issue without Leave of Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *subs.* 1 (*g*)—*Rules of Supreme Court*, 1883, *Order* IX., *r.* 6; *Order* XLII., *r.* 10.

Where a creditor has obtained judgment against a firm, but has not obtained the requisite leave under Order XLII., r. 10, to issue execution against a person alleged to be a member of the firm, he cannot serve such person with a notice under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, subs. 1 (*g*), which enables a creditor who has obtained final judgment against a debtor, "execution thereon not having been stayed," to issue a notice requiring the debtor to pay or secure the debt.

APPEAL against a receiving order made by Mr. Registrar Hazlitt against Leon M. Ide.

The order was made upon a bankruptcy petition presented by Messrs. Toye & Bromley. On the 4th of January, 1886, Toye & Bromley issued a writ in the Queen's Bench Division against

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"Ide & Co." On the same day the writ was served on some person at 102, Fenchurch Street, the place of business of the firm of Ide & Co. The writ was never served personally on Leon M. Ide. On the 23rd of January judgment was signed for 167*l.* 12*s.* 9*d.* and costs, and the plaintiffs afterwards issued a bankruptcy notice, which was addressed to "—— Ide & —— Ide, trading as Ide & Co., 102, Fenchurch Street," claiming the payment of 176*l.* 6*s.* 7*d.*, as "being the amount due on a final judgment obtained by them against you in the Queen's Bench Division." The debt not having been paid within the time limited by the notice, the plaintiffs presented a bankruptcy petition, which was entitled, "In re Leon M. Ide and Edward Godfrey Ide, trading as Ide & Co." The petition was founded on the judgment debt, and it alleged that "Leon M. Ide and Edward Godfrey Ide, trading as aforesaid," had committed an act of bankruptcy by non-compliance with the bankruptcy notice. The petition was served on Leon M. Ide, and he gave notice of his intention to oppose the making of a receiving order against him. On the hearing of the petition on the 28th of January the registrar held upon evidence that Leon M. Ide was a partner in the firm of Ide & Co., and he made the receiving order.

Against this order Leon M. Ide appealed.

The plaintiffs had not obtained leave in the action to issue execution on the judgment against Leon M. Ide.

Herbert Reed, for the appellant. Assuming that the judgment was a valid judgment against the firm, and against Leon M. Ide as a member of it, still execution on the judgment could not issue against him without the leave of the Court: Order XLII., r. 10 (*c*). (1)

It follows, therefore, that a bankruptcy notice could not pro-

(1) Order IX., r. 6: "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm."

Order XLII., rule 10: "Where a judgment or order is against a firm, execution may issue:

"(*a.*) Against any property of the partnership;

"(*b.*) Against any person who has appeared in his own name under Order XII., r. 15, or

perly be issued against him under subs. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883 (1), and, consequently, he has not committed an act of bankruptcy, and there was no power to make a receiving order against him. In requiring, as a condition to the issuing of the bankruptcy notice, that execution on the judgment shall not have been stayed, subs. 1 (*g*) implies that the creditor would, but for the stay of proceedings, be in a position at once to issue execution. Execution cannot be stayed unless there is a possibility of issuing it. Here the petitioning creditors were not in a position to issue execution against Leon M. Ide until they had obtained the leave of the Court to do so.

That this is the true construction of sub-s. 1 (*g*) is clear from the ratio decidendi of *Ex parte Woodall* (2) and *Ex parte Blanchett.* (3)

F. Cooper Willis, for the petitioning creditors. The registrar, on the evidence before him, which consisted in part of the cross-examination of Leon M. Ide, was satisfied that he was a partner in the firm.

The writ was served in the mode prescribed by rule 6 of Order IX., and therefore there was a valid service on the firm and on every member of it. Consequently, Leon M. Ide was "served as a partner" within the meaning of rule 10 (*c*) of Order XLII., and execution could issue against him without leave.

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who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

"(*c*) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

"If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

(1) Sect. 4 (1): "A debtor commits an act of bankruptcy in each of the following cases: (inter alia)—

"(*g.*) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt in accordance with the terms of the judgment," &c.

(2) 13 Q. B. D. 479.

(3) 17 Q. B. D. 303.

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LORD ESHER, M.R. A judgment has been obtained against Ide & Co., that is, against the firm, whether regularly obtained or not I do not stop to inquire, and, as against the firm, it was in my opinion a final judgment. That judgment having been obtained, by Order XLII., r. 10, execution could immediately issue against the property of the firm.

It is argued for the petitioning creditors that execution could issue also against the private property of one member of the firm, because, it is said, that member of the firm has been served with the writ, and he is, therefore, within the meaning of clause (*c*) of rule 10 of Order XLII., a person "who has been served, as a partner, with the writ of summons." It is said he has been served, because, by virtue of rule 6 of Order IX., service of the writ as there pointed out is service on the firm, and is therefore service on him. If that were so it would make clause (*c*) of rule 10 of Order XLII. pure nonsense. The meaning of the two rules taken together is, I think, this: if you obtain a judgment against a firm, you may then issue execution against the property of the firm, but you cannot issue execution against the private property of any member of the firm without the leave of the Court, unless that member has been actually served as a partner with the writ of summons, or unless he has appeared in his own name, or unless he has admitted on the pleadings that he is, or has been adjudged to be, a partner. Unless he is in one of those categories, leave must be obtained to issue execution against his private goods. That is exactly the position of Leon M. Ide. A judgment has been obtained against the partnership firm, but he has not been served with the writ within the meaning of clause (*c*) of rule 10, for that refers to a person who has been actually served with the writ. He has not been personally served with the writ. Neither has he appeared in his own name, or admitted that he is, or has been adjudged to be, a partner. Execution against his private goods could not therefore go without the leave of the Court, and, therefore, although there has been a judgment against the firm, and against him as a member of the firm, yet execution cannot go against him, that is, against his goods by seizure of them, without the leave of the Court. He is a person against whom a creditor had obtained a final judgment,

but against whom the creditor could not issue execution without leave.

Under these circumstances, is he a person against whom, under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, a bankruptcy notice can be issued, upon failure to comply with which he can be made a bankrupt? Sub-s. 1 (*g*) says: "If a creditor has obtained a final judgment against him" (that is against the person whom he proposes to make bankrupt) "for any amount, and, execution thereon not having been stayed," has served on him a bankruptcy notice. It is true that in the present case execution on the judgment has not been stayed, but the words seem to me necessarily to imply that the judgment must be one upon which execution could go immediately, unless it was stayed. But here execution cannot go immediately whether it is stayed or not; it cannot go without the leave of the Court. I think, therefore, that this was not a final judgment such as is described in sub-s. 1 (*g*) on which a bankruptcy notice could issue. I decide this case, not by reason of any previous authority which is binding on this Court, for I do not think there is one, but in accordance with what seems to have been the view of the Court, or at all events seems to have been in the minds of the judges, although they were not then called upon to decide the point, in the two cases which have been referred to. On the true construction of sub-s. 1 (*g*) I think the appellant was not a person against whom this bankruptcy notice could properly issue, and therefore his appeal must be allowed.

Bowen, L.J. I am of the same opinion. With regard to the suggestion that, judgment having been obtained against the firm, execution might issue against Leon M. Ide under Order XLII., rule 10, I agree entirely with what the Master of the Rolls has said, and I have nothing to add.

With regard to the construction of sub-s. 1 (*g*) of s. 4, I also agree that, in order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice. It would be absurd to suppose that sub-s. 1 (*g*) admitted of this construction, that in a case in which execution could have gone at once, but for the order of the Court staying it, a bankruptcy notice

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could not be issued, and yet that, in a case in which execution could never have gone at all without the leave of the Court, a bankruptcy notice could be issued, and the debtor could be adjudged a bankrupt. We must look carefully at the words to see if there is not an implication to be found in them, and it seems to me that, from the collocation of the words "final judgment" and "execution thereon not having been stayed," a necessary implication arises of this character, viz., that the creditor must not merely have obtained a final judgment but must be in a position to issue immediate execution upon it.

FRY, L.J. In dealing with sub-s. 1 (*g*) in *Ex parte Woodall* (1) Lindley, L.J., said (at p. 483), "The words 'execution thereon not having been stayed' shew clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment; it is assumed that execution might have been stayed." With that view of the sub-section I entirely agree. It would be very strange if the enactment were that a bankruptcy notice could not be issued when execution on the judgment had been stayed, and yet that a bankruptcy notice could be issued when execution could not go at all without the leave of the Court, and the proceedings had not been stayed simply for that reason. I agree that this appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *W. F. Summerhays.*
Solicitor for petitioners: *W. Morley.*

(1) 13 Q. B. D. 479.

W. L. C.

THE QUEEN *v.* SIR RUPERT KETTLE AND BROWN. 1886 *July* 10.

Practice—County Court—Appeal by Motion—Special Case—Supreme Court of Judicature Acts, 1873 (36 & 37 *Vict. c.* 66), 1875 (38 & 39 *Vict. c.* 77), *and* 1884 (47 & 48 *Vict. c.* 61)—*Order LIX., rr.* 9, 10.

All appeals from county courts to the Queen's Bench Division of the High Court must since Order LIX., r. 10, be by notice of motion, notwithstanding the 13 & 14 Vict. c. 61, ss. 14, 15, which gave an appeal by special case.

RULE calling upon the judge of the Dudley County Court and the plaintiff in an action of "*Brown* v. *Dowse & Son*" in that court, to shew cause why the judge should not settle and sign a case on appeal in the action.

The action was for injuries sustained by the plaintiff whilst in the employment of the defendants, by reason of alleged negligence on their part. The case was tried before the judge and a jury on the 2nd of February, 1886, and resulted in a verdict for the plaintiff for 21*l.* The defendants' solicitor, being desirous of appealing, on the ground that there was no evidence to go to the jury in support of the plaintiff's claim, sent a draft special case to the plaintiff's solicitor for his approval. The latter declined to receive it, alleging that the appeal should be by notice of motion under Order LIX., rule 10, and not by special case under 13 & 14 Vict. c. 61, ss. 14, 15. The defendants' solicitor then sent a copy of the draft case to the registrar of the county court, and gave notice to the plaintiff's solicitor that he should attend the judge on the 12th of April to ask him to settle and sign the same. The defendants' solicitor accordingly attended the judge on the 12th of April, when the plaintiff's solicitor renewed his objection, and the judge declined to settle and sign the case.

David, shewed cause. Rule 9 of Order LIX. provides that "the following rules of this order shall apply to appeals to the Queen's Bench Division from county courts and other inferior courts of record of civil jurisdiction in all proceedings other than proceedings in bankruptcy:" and r. 10 provides that "every such appeal shall be by notice of motion, and no rule nisi or order to

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shew cause shall be necessary." The notice of motion is to be served and the appeal entered within twenty-one days from the date of the judgment, order, or finding complained of: r. 12.

Graham, in support of the rule. Rule 10 is ultrà vires. The appeal by special case is given by 13 & 14 Vict. c. 61, ss. 14, 15 (1), and a further and additional appeal is given, by motion, by s. 6 of 38 & 39 Vict. c. 50; but the last-mentioned enactment does not affect the right of appeal by special case. The Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 17, gave the judges of the High Court power to make further and additional rules for carrying the principal Act and that Act into effect; and in particular "for regulating the *pleading, practice, and procedure of the High Court of Justice* and Court of Appeal, and "generally, for regulating any matters relating to the practice and procedure of the said Courts respectively," &c.: and by s. 23 of the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), that power is extended to the making of rules "for regulating the procedure on appeals from inferior courts (including county courts) to the High Court." But these enactments only empower the judges to deal with procedure in the Supreme Court, and do not interfere with the statutory right of appealing from the decision of a county court judge under 13 & 14 Vict. c. 61; consequently, Order LIX., r. 10, of the recent rules does not apply to appeals by special case. Sect. 23 of the Supreme Court of Judicature Act, 1884,—the language of which is very obscure,—does not enable the judges to repeal the Act of 1850. And, at all events, the Court has power, under r. 16 of Order LIX., to extend the time for appealing, upon such terms as it shall think just, to ensure the determination on the merits of the real questions in controversy between the parties, where the time prescribed by

(1) Sect. 14 gives an appeal to any of the Superior Courts of Common Law to a party who shall be dissatisfied with the determination or direction of the Court in point of law, or upon the admission or rejection of evidence, upon certain terms. And s. 15 enacts that "such appeal shall be in the form of a case agreed on by both parties or their attorneys, and, if they cannot agree, the judge of the county court, upon being applied to by them or their attorneys, shall settle the case and sign it; and such case shall be transmitted by the appellant to the rule department of the masters' office of the Court to which the appeal is to be brought."

r. 12 has been suffered to elapse by reason of a mere inadvertence or slip on the part of the solicitor; especially where, as here, there has been a bonâ fide and real mistake as to the meaning of an enactment: see *Collins* v. *Paddington Vestry* (1), and *Pritchard* v. *Pritchard.* (2)

WILLS, J. I am of opinion that both branches of this application fail. As to the first, I must confess I should have thought it too clear for argument. The Judicature Act, 1875, by s. 17 empowers the judges to make further and additional rules for carrying the principal Act (of 1873) and that Act into effect, and in particular for regulating "the pleading, practice, and procedure in the High Court of Justice and Court of Appeal." The rules made under the authority of those Acts do in many respects qualify the rules of law resting upon Acts of Parliament. It is not necessary for us to decide whether or not the statement of a case on appeal from a county court is a proceeding in the High Court within s. 17 of the Act of 1875, because s. 23 of the Supreme Court of Judicature Act, 1884, enacts that "the power to make rules conferred by s. 17 of the Supreme Court of Judicature Act, 1875, and enactments amending the same, shall be deemed to include the power to make rules for regulating the procedure on appeals from inferior courts to the High Court." That enactment would have been unnecessary if it had been intended to deal only with procedure in the High Court. How can it be said that a rule is ultrà vires which provides that, whereas heretofore the procedure upon appeal from a county court might have been by special case, it shall henceforth be by notice of motion only?

Then it is said that we ought at all events to grant an extension of the time for appealing, under r. 16 of Order LIX. We are told that the defendants' solicitor did not know of the alteration in the practice effected by the new rule. But it had been in operation for a month; and the case falls within the category of ignorance of the law suggested by Baggallay, L.J., in *Collins* v. *Paddington Vestry.* (1) There is, as is suggested in that case (3),

(1) 5 Q. B. D. 368. (2) 14 Q. B. D. 55.

(3) At p. 380.

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a material distinction between a slip or mistake before and after judgment: and I feel the full force of the observation. There comes a time when everything must be final. When judgment has been given, the successful litigant has a right to be protected against the too liberal indulgence of the Court.

GRANTHAM, J. I am of the same opinion. I am utterly at a loss to understand how it can be for a moment contended that the rule in question is ultrà vires. It was framed expressly for the purpose of doing away with appeals from county courts by way of special case: and I cannot conceive language better adapted to carry out that intention. As to the second point, I desire to reserve my opinion. But I agree with my Brother Wills, that in this case the defendants did not come to us in proper time. When the plaintiff's solicitor was served with a copy of the special case, the mistake into which the defendants' solicitor had fallen was pointed out to him, and he still attempted to proceed with the special case. If, instead of doing that, he had come promptly for relief, there might have been some ground for granting the defendants the indulgence which they now seek under r. 16.

Rule discharged.

Solicitor for plaintiff: *E. J. Jacob, for Waldron, Brierley Hill.*

Solicitors for defendants: *Mackeson, Taylor, & Arnould, for Thomas Homer, Brierly Hill.*

J. S.

SIMONDS AND OTHERS, APPELLANTS; JUSTICES OF THE BLACKHEATH LICENSING DIVISION, RESPONDENTS.

STEWART, APPELLANT; JUSTICES OF THE BLACKHEATH LICENSING DIVISION, RESPONDENTS.

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Inn—Licence — Transfer at Special Sessions—Limited Discretion to refuse— 32 & 33 *Vict. c.* 27, *ss.* 8, 19; 33 & 34 *Vict. c.* 29, *s.* 4, *sub-s.* 4, *s.* 7.

The Wine and Beerhouse Act (1869) Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 4, sub-s. 4—which enacts that it shall be in the discretion of the justices to whom an application for a transfer of a licence is made either to allow or refuse the application, or to adjourn the consideration thereof—is intended only to affect the procedure as to adjournment at sessions for the transfer of licences.

Therefore on an application to justices at special sessions for a transfer of a licence to sell beer to be consumed on or off premises in respect of which such a licence was in force on the 1st of May, 1869, and has since been renewed from time to time, the discretion of the justices is limited as it is on an application at the general licensing meeting for a grant by way of renewal of the licence, and the application for the transfer can only be refused on one or more of the four grounds specified in the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), ss. 8, 19.

AT the quarter sessions for Kent held on the 10th of April, 1886, appeals in which W. Stewart and others were the appellants and certain justices for the Blackheath licensing division respondents, were dismissed subject to the following case:—

The appellants were the owners of the house called "Lord Lorne," and the appellant William Stewart was the proposed transferee of a licence to sell by retail beer and cider to be drunk and consumed on and off the premises.

The appellant William Stewart was the tenant of the house under an agreement whereby his tenancy was determinable by a three months' notice expiring on any day, and the respondents, the licensing justices, at their special sessions refused to transfer the licence unless the applicant was proved to have a real bonâ fide interest in the premises equivalent at least to that of a tenant for one year. The appellants refused to comply with this condition.

It was proved at the hearing of the appeals that the house had been licensed for the sale of beer and cider on the 1st day of

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May, 1869, and had been so licensed continuously ever since, and one of the grounds of appeal was, that inasmuch as on the 1st of May, 1869, and continuously ever since, an excise licence was and had been in force with respect to the house for the sale by retail therein of beer and cider to be consumed either on or off the premises, it was not lawful for the respondents to refuse the application for the transfer of the said licence except upon one of the grounds mentioned in s. 8 of the Wine and Beerhouse Act, 1869, and that upon neither of those grounds did the respondents refuse the application.

The respondents did not refuse the application upon any one of the grounds mentioned in s. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27). (1)

It was contended on behalf of the respondents that the 19th

(1) By s. 19 of the Wine and Beerhouse Act, 1869: Where, on the 1st of May, 1869, a licence under any of the recited Acts is in force "with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises, may be refused in accordance with this Act."

By s. 8, "No application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except upon one or more of the following grounds, viz.:—

"1. That the applicant has failed to produce satisfactory evidence of good character:

"2. That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character:

"3. That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence or from selling any of the said articles:

"4. That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

"Where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision."

section of the Wine and Beerhouse Act, 1869, was qualified by the Amendment Act, 1870 (33 & 34 Vict. c. 29) (1), and that they thereby had absolute discretion to refuse an application for a transfer, though it limited their discretion in an application for the grant by way of renewal of a licence.

The question for the opinion of the Court was whether the respondents were limited in their discretion on the application for a transfer at a special sessions as they are on an application for the grant by way of renewal of the licence at each and every annual general licensing meeting when such licence is in respect of a beerhouse licensed on the 1st of May, 1869, and continuously licensed ever since that date.

June 1. *Poland*, and *Kinloch Cooke*, (*Besley*, with them), for the appellants. The beerhouse was licensed on the 1st of May, 1869, and had been licensed continuously since, and therefore the renewal of the licence could only be refused on some or one of the four grounds specified in 32 & 33 Vict. c. 27 (The Wine and Beerhouse Act, 1869), ss. 8 and 19. None of those grounds of refusal existed in this case. The renewal could not have been refused to the original holder of the licence, and s. 19 is, by 33 & 34 Vict. c. 29, s. 7, extended to licences granted by way of renewal from time to time of licences in force on the 1st of May, 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons. The same right of renewal applies to cases of transfer and the justices have not an absolute discretion to refuse it. Sect. 4 only empowers them to adjourn the consideration of the matter.

F. M. White, Q.C. (*Glyn*, with him), for the respondents. Under 9 Geo. 4, c. 61, and the Acts amending the same the transfer of licences was in the absolute discretion of the justices. By 5 & 6 Vict. c. 44, s. 1, at any petty session "it shall be lawful" in those

(1) By s. 4, sub-s. 4, of the Wine and Beerhouse Act Amendment Act, 1870, it is enacted that "It shall be in the discretion of the justices to whom an application for a transfer is made, either to allow or refuse the application, or to adjourn the consideration thereof."

Sect. 7 extends s. 19 of the Wine and Beerhouse Act, 1869, to licences granted by way of renewal from time to time of licences in force on the 1st of May, 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons.

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cases where justices at a special session are empowered by the 9 Geo. 4, c. 61, to transfer a licence, for justices at a petty session to do so. This applies to certificates under the Wine and Beerhouse Act, 1869, and the Amendment Act, 1870 (33 & 34 Vict. c. 29, s. 4). Sect. 19 of the Act of 1869 only applies to the general annual licensing meeting, and s. 7 of 33 & 34 Vict. c. 29, on which the appellants rely, does not affect transfer sessions. It is a provision ex abundanti cautelâ to prevent the objection being made against an applicant for renewal at the general annual licensing meeting that he was not the original licensee. An application at that meeting is not for a transfer but for a certificate. And although the discretion to refuse a certificate by way of renewal is, no doubt, qualified by s. 19 of the Act of 1869, the discretion to refuse a transfer at transfer sessions is unlimited. The terms of 33 & 34 Vict. c. 29, s. 4, sub-s. 4, are that "it shall be in the discretion of the justices to whom an application for transfer is made either to allow or refuse the application, or to adjourn the consideration thereof."

Poland, in reply. When a licensee assigns to another he may under 9 Geo. 4, c. 61, s. 4, go with his transferee to special sessions, and the justices may transfer the certificate for the remainder of the year to the new tenant until the general meeting, and the new tenant merely goes to the general meeting and applies for a renewal.

Sect. 7 of 33 & 34 Vict. c. 29, and s. 19 of the Act of 1869, probably apply both to the general meeting and to the special sessions. The application for a transfer is in effect an application for a certificate, and if so, s. 8 of the Act of 1869 applies so as to limit the discretion of the justices to refuse it.

Cur. adv. vult.

Aug. 11. The judgment of the Court (Lord Coleridge, C.J., and Bowen, L.J.) was delivered by

LORD COLERIDGE, C.J. This case raises the question whether on an application for the transfer of a licence to sell excisable liquors on or off the premises, the discretion of the justices to grant or refuse the application is limited by the four rules mentioned in s. 8 of the Wine and Beerhouse Act of 1869. It

was contended before us in the argument on behalf of the justices that the fetter on their discretion had, in the case of applications for a transfer, been removed by s. 4 of 33 & 34 Vict. c. 29, which is in the following words: "It shall be in the discretion of the justices to whom an application for a transfer is made, either to allow or refuse the application, or to adjourn the consideration thereof." On the other hand it was urged by the appellants that the only object and effect of this provision was to confer upon the justices a power to adjourn when they were sitting in special sessions, the Act of 9 Geo. 4, c. 61, having conferred upon them only a power to adjourn when acting at the general annual licensing meeting, and there being no similar provision made for the adjournments of special transfer sessions. We are of opinion that this latter interpretation of s. 4 of 33 & 34 Vict. c. 29, is the correct one. It can hardly have been the will or intention of the legislature to enable the justices to exercise an unlimited power of refusal over transfers, which they did not possess upon applications for the renewal of a licence, or to place at their mercy a beerhouse in the case of which a transfer was requested—otherwise a beerhouse might lose its licence at the mere pleasure of the justices if it became necessary in the course of a year to transfer the premises to a new tenant. It can scarcely be contended that s. 4 was intended to enable the justices in allowing transfers to disregard at their discretion statutory disqualifications which hitherto had existed, and if no previous restrictions upon the allowance of applications for a transfer were meant to be retained, it would seem unnatural to infer that previous statutory fetters upon disallowance or refusal were, by a side wind, to be abolished. We think that the section, though perhaps inartistically expressed, really was designed only to perfect the procedure at a transfer sessions by making adjournments lawful, the legality of which was previously at least doubtful: and that the section does not really do more than this. The question put to us we answer accordingly in the affirmative, and the appeal must be successful, costs following the event.

Solicitors for appellants: *Simonds & Goolden.*

Solicitors for respondents: *Smith & Batchelor.*

J. R.

Referred to. JAMES *v.* HUTTON & COOK & SONS [1950] 1 K. B. 9

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MORGAN AND ANOTHER *v.* HARDY AND ANOTHER. FOTHERGILL, THIRD PARTY.

Landlord and Tenant—Covenant to deliver up Premises in sufficient Repair—Damages, Measure of—Repairs no longer necessary to command Rent—Indemnity against Covenant to leave Premises in repair—Bankruptcy of Surety during Term—Proof by Person indemnified—"Liability present or future, certain or contingent"—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), s. 31.

In an action against the assignee of a lease of a house for breach of covenant to leave the premises in repair at the end of the term, it appeared that owing to changes in the surrounding property the house had so far altered in value since the commencement of the lease that it would be as valuable for letting purposes if some of the repairs required by the covenant according to its strict meaning were either omitted or executed at a cheaper rate than was usual under such a covenant:—

Held, by Denman, J., that the facts above mentioned were no ground for limiting the liability of the defendant under the covenant, and that the measure of damages for a breach of it was the amount required to put the premises into such repair as was originally contemplated by the covenant.

In an action upon an agreement to indemnify against a covenant to leave premises in repair at the end of the term, it appeared that the agreement was made in 1873, that the defendant became bankrupt in 1875, and that the term expired in 1883:—

Held, by Denman, J., that the defendant's bankruptcy was no answer to the action, for his liability was not "a liability present or future, certain or contingent," within s. 31 of the Bankruptcy Act, 1869, so as to be proveable in the bankruptcy.

FURTHER CONSIDERATION.

The facts and arguments are fully stated in the judgment.

B. F. Williams, Q.C., and *Abel Thomas*, for the plaintiffs.

Lumley Smith, Q.C., and *T. Terrell*, for the defendants.

McIntyre, Q.C., and *C. Higgins*, for the third party.

In addition to the cases referred to in the judgment the following were cited: *Wigsell* v. *School for Indigent Blind* (1); *Whitham* v. *Kershaw*. (2)

Cur. adv. vult.

July 10. DENMAN, J., delivered judgment as follows:—

This was an action brought for breach of covenant to keep and deliver up certain buildings and outhouses in repair.

(1) 8 Q. B. D. 357. (2) 16 Q. B. D. 613.

The statement of claim alleged in substance that by a lease of the 9th of January, 1833, from the plaintiffs' predecessor in title to the defendant's predecessor in title, certain messuages, cottages, lodges, barns, stables, sheds, lands, and hereditaments, part and parcel of the messuage, farm and lands called Gwaidolygarth, were demised for fifty years seven months and twenty-two days from the date, and that the lessees covenanted to keep and to yield up at the end of the term all and singular the houses, outhouses, and buildings and other things upon the demised premises in such repair and condition as therein mentioned; and that the premises were kept and yielded up out of such repair to a large extent. The statement of defence denied any want of repair, and as to Pen-y-darran House and buildings, which were included in the plaintiffs' particulars as being out of repair, denied that they were premises included in the lease of the 9th of January, 1833.

The defendants then put in a counter-claim to the effect that if it should appear that Pen-y-darran House, &c., was included in the lease such inclusion was by mistake, and they claimed rectification. This the plaintiffs denied in his reply.

The defendants were allowed to bring in Fothergill as a third party. It was not denied on his behalf that strong covenants of indemnity had been given upon which he would be liable to the defendants if the defendants were liable, but he relied upon the defendants' case, and further set up his discharge under liquidation proceedings, to which the defendants replied that the claim made by them in this action was not a debt proveable in the liquidation to which the discharge applied.

The case came on before me and a special jury at the last Swansea Assizes, but in the course of the case the parties agreed to dispense with the jury, and afterwards that it should be referred to Mr. Thomas Bullen to report as special referee, and to find as to damages, if any, and that after he had reported, the case of all parties should be argued before me.

The referee's report is confined to the questions arising upon damages only. The facts relating to the other questions were admitted before me either at the trial or on the argument on further consideration. They were as follows:—

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In 1787 the plaintiffs' predecessor in title demised to the defendants' predecessors in title "all that messuage, tenement, farm and lands called and known by the name of Gwailodygarth, together with all houses, barns, stables, outhouses, buildings, gardens, orchards, closes, grounds, meadows, leasows, pastures, feedings, commons, profits, ways, parks, passages, waters, watercourses, easements, privileges, advantages, and appurtenances whatsoever to the said messuage, tenement, farm, and lands belonging or appertaining, and also full liberty to dig and take from the land so much sand as shall be wanted for carrying on the ironworks at Pen-y-darran for the life of the survivor of the lessees at the rent of 100*l.*" And the lessor covenanted with the lessees that it should be lawful for them, their heirs, executors, administrators, or assigns, within three years from the date thereof to mark out two acres of land out of certain closes on the demised premises within a ring fence for the purpose of building one or more habitations, and that as soon as the said two acres should be so marked out the lessor would grant a lease of the said two acres with certain rights of access, &c., from the 25th of March then next for ninety-six years at the rent of 14*l.* from the decease of the survivor of the lessees, the lease to contain covenants on the part of the lessees to inclose the said two acres, and after the decease of the survivor to keep during the residue of the term of ninety-six years and to deliver up at the end, all such houses, outhouses, buildings, gardens, and improvements as should be made on the said two acres in *tenantable* repair and condition.

Nothing apparently having been done by way of selecting the two acres, in the meantime, in 1791 the same parties entered into an agreement, which after reciting the lease of 1787, and that the parties had mutually agreed to extend the time of marking out the said two acres to six months after the decease of the survivor, contained a covenant on the part of the lessor of 1787 that it should be lawful for the parties who were to set out the two acres to mark them out within six months of the decease of the survivor on parts of certain fields on which the covenantees were then erecting a messuage or dwelling-house. And that the covenantor, his heirs or assigns, would, at the request of the covenantees, their executors or assigns, execute a lease of the said two acres and the buildings which should be built thereon,

for ninety-six years from the 25th of March, 1787, at the rent of 14*l.* per annum, from the decease of the survivor, the said lease to contain all usual and reasonable covenants, and particularly covenants on the part of the lessees to inclose the two acres with a ring fence and the same to keep in repair, and to leave in tenantable repair at the end of the term all such houses, out-houses, buildings, gardens, and improvements as shall be made upon the said two acres. Between 1791 and 1833 a mansion-house, known as "Pen-y-darran House," was built upon the two acres, and was still standing there at the time when the present disputes arose.

In 1833 the plaintiffs' predecessors in title granted a lease to the defendant's predecessors in title, which the plaintiffs contended to be applicable to the two acres and Pen-y-darran House erected thereon, but which the defendants maintained to be applicable only to the residue of the property contained in the lease of 1787, exclusive of the two acres and Pen-y-darran House built thereon.

By that lease William Morgan, the plaintiffs' predecessor in title, granted to the lessees, the defendants' predecessors in title, their heirs, administrators, and assigns, "all those several messuages, cottages, lodges, barns, stables, sheds, gardens, yards, closes, fields, meadows, and ground covered with wood, plantations, pieces or parcels of land, part and parcel of all that messuage, farm, and lands called Gwailodygarth *comprised in the schedule hereunder written and delineated* or set forth in or upon a map or plan thereof hereunto annexed, or hereupon indorsed, and which said hereditaments, lands, and premises hereby demised or expressed, and intended to be so demised, contain by admeasurement 96A. 1R. 24P., be the same more or less, together with all out-houses, &c., to the said several messuages, &c., belonging or in any wise appertaining." The lease then contained a reservation of certain timber and of all mines and minerals, with liberty to Morgan to work such minerals, "making compensation to the lessees not exceeding 50*s.* per acre per annum for so much of the surface of the productive land, as described in the schedule and map annexed, damaged by any of the means aforesaid," for fifty years seven months twenty-two days, at a

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rent of 210*l.* per annum. The lessees also covenanted that they would at all times during the term "well and sufficiently repair and keep in repair all and singular the houses, out-houses, and buildings now standing or being upon the *said* demised premises, or which shall or may hereafter be erected or built thereon by the lessees for the more convenient occupation of the same as a farm only.—And the same premises being in all respects so well and sufficiently repaired and kept in repair, at the end of the term yield up, &c." The lease contained other covenants usual in farming leases, with liberty to Morgan to inclose such parts of the land as are expressed in the schedule to be non-productive; and the lessees covenanted not to let for building nor to build any dwellings or erections other than shall be necessary for the occupation of the said house and land demised for agricultural purposes or to be used as a farm without written consent.

On the back of the lease was the map or plan referred to in the lease. The different parts of the property demised were divided from one another in this map or plan by well-defined black lines, each division being numbered, with the exception of a portion of road and waste.

Alongside of the map or plan, on the back of the lease, was the only thing which could be called a schedule, and which I have no doubt is the schedule referred to in the lease. It is headed "Reference to Plan referred to in Lease" and consists of four columns. The first headed "Nos. on Map;" the second "Parcel;" the third and fourth are both under a heading "Description of Land," the third being itself headed "Wood, Road, and Garden. Houses A. R. P., the fourth Productive Meadow A. R. P." No. 10 on the map is described as "House, Garden and Wood" under the head "Parcels," and in the third column under "Wood, Road, and Garden Houses A. R. P." are the figures 2 0 0 opposite this parcel, and in the fourth column the figures 2 3 4." And it was clearly proved that the 2 0 0 meant the two fenced acres on which Pen-y-darran House stood.

Pen-y-darran House was occupied by Thompson, one of the lessees of 1833, until 1865 as his dwelling-house, he being (as described in the lease of 1833), one of the partners in certain Pen-y-darran Ironworks in the immediate neighbourhood.

In 1864, on the 18th of January, Foreman, the defendant Harding's predecessor in title, amongst other things agreed to sell to Davies and others Pen-y-darran House and garden, and Davies and others agreed forthwith to put Pen-y-darran House, &c., in good and substantial repair and to keep them so during the whole of the time for which they were held. On the 16th of December, 1864, the third party, Fothergill, agreed to purchase, amongst other things, all the leasehold property acquired by Davies and others from Foreman. The vendors to become tenants to the purchaser of Pen-y-darran House at 200*l.* a year, the purchaser to be under all the same obligations as by the agreement of the 1st of January are imposed on the vendors.

On the 19th of July, 1873, by a deed reciting the agreement of 1791 and the lease of 1833, and the agreements of the 1st of January and the 16th of December, 1864, the parties thereto of the first part, including Davies and others, assigned to Fothergill and another, their executors, administrators, and assigns, amongst other things, 6thly, all the land, tenements and hereditaments, rights, powers, and privileges agreed to be demised on the 1st of August, 1791, for the residue of the term thereby agreed to be granted, subject to the covenants in the said articles on the part of the lessees to be observed; 17thly, all and singular the lands, tenements, and hereditaments demised by the indenture of the 9th of January, 1833, during the residue of the term of fifty years seven months and twenty-two days thereby granted, subject to the covenants on the part of the lessees to be observed. And the assignees, Fothergill and Hankey, covenanted with Davies & Co. and their assignees, to perform all the covenants of the recited deeds, leases, and articles of agreement.

The first question raised before me was whether the two acres fenced off under the agreements of 1787 and 1791, and on which Pen-y-darran House and garden stood in 1833, were included in the lease of the 9th of January, 1833. The defendants' counsel argued that they were not, and that if they were the lease of 1833 ought to be rectified. To which the plaintiffs' counsel replied that if not within the lease of 1833 the two acres in question were clearly included in the agreements of 1787 and 1791, and, if necessary, an amendment ought to be made, so as to bring the

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claim under those agreements. I do not think that either rectification or amendment is required or ought to take place. As regards rectification, it is indeed admitted that under circumstances not explained the plaintiffs' predecessors have since 1833 received 14*l.* per annum for Pen-y-darran House in addition to the 210*l.* rent reserved by that lease. But looking at the map or plan and schedule to that lease I think it is so absolutely certain that the two acres, including Pen-y-darran House and garden, are included in that lease, that I have no right to alter it so as to exclude two acres of the 96A. 1R. 24P., which can only be made up by including those two acres. I am not asked in this counterclaim to order the plaintiffs to refund any part of the 14*l.* per annum paid in excess of the 210*l.* rent reserved by the lease of 1833, nor have I had before me the materials for saying whether there is any case for so ordering. The sole question before me is whether Pen-y-darran House and the two fenced acres are within the lease of 1833.

It was further argued that I ought to hold that they are not, because the lease of 1883, though it contains words sufficient to carry the house and two acres, makes no specific mention of Pen-y-darran House by name, which was a considerable mansion-house, and because it is in the main an agricultural lease. But the lease contains ample words covenanting for the repair, &c., "of all houses now standing upon the demised premises," and the demised premises, referring to the parcels, are, "all those several messuages, &c., part and parcel of all that messuage, farm, and lands called 'Gwailodygarth,' comprised in the schedule hereunder written and delineated, &c."

The description in the lease of 1787 was "all that messuage, tenement, farm, and lands called "Gwailodygarth," together with all houses, &c., belonging."

Taking these two descriptions together, I think it would be contrary to all true principles of construction to hold that the two acres were not included in the lease of 1833.

Much stress was laid upon the circumstance that the plaintiffs before the expiration of the lease of 1833, which was for a term beyond the term contemplated by the agreement of 1791, elected to turn the mortgagees-in-possession of the defendants out by

demanding possession at the expiration of the time mentioned in the agreement, viz., on the 25th of March, 1883, and thereupon the mortgagees in possession went out of possession. It appears, however, very clearly from a subsequent letter of the 29th of March that the plaintiffs were then under the impression that a separate lease had been granted for Pen-y-darran House and garden for the term mentioned in the agreement of 1791, whereas there was in fact no such separate lease. This mistake, however, does not prevent the defendants from being liable for the want of repair which existed at the actual expiration of the lease of 1833, if Pen-y-darran House was, as I think it clearly was, included in that lease. The action was brought, after the expiration of that lease, for dilapidations both of Pen-y-darran House and of the farm-house and buildings, and for both of these I think the defendants are responsible.

As to the damages, it was agreed at the trial that they should be assessed by a referee, who was to report to me thereupon, the third party being at liberty to take part in the inquiry.

The referee's report, which raises an important question of principle, is, so far as it is material to state it here, as follows:—"And whereas at the said hearing the counsel for the plaintiffs contended that the proper measure of damages in the said action is what it would have cost to put the said premises into repair at the expiration of the lease referred to in the plaintiffs' statement of claim, and claimed to have the damages assessed upon that footing, and whereas at the said hearing the counsel for the defendants contended that the said premises and the surrounding property had greatly diminished in marketable value since the making of the said lease, and that in consequence of such diminution in value a great portion of the repairs mentioned in the plaintiffs' particulars were not suited to the said premises, and were unnecessary for their use and enjoyment, and that therefore the proper measure of damages in the said action is the actual loss to the plaintiffs' reversion, and that the assessment ought to be limited to those items in the plaintiffs' particulars which would be productive of advantage to the plaintiffs, and would improve the value of the premises as they are at present used, or in other words, that the damages should be limited to the amount

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which would be expended by a prudent and reasonable man in repairing the said premises so as to be productive of remuneration, and the said counsel for the defendants accordingly claimed to have the damages assessed upon that footing as between the plaintiffs and the defendants. Now I (the referee) having duly examined and considered the condition of the said premises, and the evidence and contentions of the parties relating to the said matters so referred to me for inquiry and report as aforesaid, do hereby report as follows:—1. That if the damages claimed by the plaintiffs in this action ought to be assessed on the footing contended for by the said counsel for the plaintiffs, then I assess such damages in respect of Pen-y-darran House and the two acres at 1280*l.*, and in respect of the farm buildings and lands other than Pen-y-darran House and the two acres, at 400*l.* 2. That if the damages claimed by the plaintiffs in this action ought to be assessed on the footing contended for by the defendants, then I assess such damages in respect of Pen-y-darran House and the two acres at 930*l.*, and in respect of the farm buildings and lands other than Pen-y-darran House and the two acres at 270*l.*"

I think it must be taken upon this report that the referee finds that the sum required to repair the premises according to the covenant would be 1280*l.* for Pen-y-darran House and the two acres, and 400*l.* for the residue of the premises, *unless* the defendants have a right to a deduction on the ground that the premises have so altered in value by reason of surrounding circumstances (which I understand him to find to exist) that it might be as valuable a house for letting purposes if some of the repairs were omitted or done more cheaply than if everything requiring to be replaced or repaired were replaced or repaired according to the ordinary rules applicable to covenants to repair.

It is difficult to put any construction upon the contention of the defendants' counsel, as stated by the referee, which would not leave it open to a lessee at the expiration of the term to raise very difficult and speculative questions, depending upon the different notions surveyors might entertain as to chances of obtaining tenants—e.g., such a question as whether a balcony which had fallen into decay might not be altogether omitted—whether an ornamental urn or pine-apple at the top of the gate posts need be

replaced. It seems a safer and more certain rule that such covenants should be construed according to the contention of the plaintiffs' counsel before the arbitrator as requiring *the premises* (by which I understand the premises which are out of repair *in all parts* of them which are out of repair) to be put into repair at the cost of the covenantor.

Several cases were cited before me on the argument bearing upon the question what is the proper measure of damages. Most of these cases were cases in which the reversioner had sued during the continuance of the term: in such a case there is always great difficulty in estimating the damage to the reversion, and judicial opinion has undoubtedly varied considerably as to the proper rule to be laid down. But when the reversion has actually fallen in I can see no reason to doubt that the proper rule is that laid down in the 4th edition of Mayne on Damages, p. 253: "Where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them."

The passage from the judgment in *Woodhouse* v. *Walker* (1), cited in the foot-note, is quite in point, though the question there arose at the expiration of a life tenancy; nor is the test given by Parke, B., in *Hosking* v. *Philips* (2) at all at variance with the rule laid down in *Woodhouse* v. *Walker* (1), where he says: "The proper measure is by how much less the premises would sell for in consequence of the wrongful act of the defendant:" for in most cases the amount required to place the premises in the state in which they ought to have been left is the same amount as that by which the selling value of the premises falls short of what it would have been if the tenant had done his duty.

There are no doubt cases in which the very act of repairing practically amounts to rebuilding, i.e., to substituting a new building for one which was not new when the tenancy commenced. In such a case no doubt the damages would fall short of the whole expenditure incurred. Such a case was *Yates* v. *Dunster*. (3) But I do not find anything in the present case to

(1) 5 Q. B. D. 408. (2) 3 Ex. 182.

(3) 11 Ex. 15.

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shew that the referee in finding the damages at 1280*l.* and 400*l.* contemplated anything more than the fair and reasonable amount required, to put into such repair as the covenant originally contemplated, the buildings which were left unrepaired by the tenants. All that he finds in order to raise the defendant's contention seems to me to amount to this, that owing to the buildings being older now than they were, or relatively inferior as compared with improvement in the neighbourhood, or looking at their *probable* future occupation by tenants of an inferior grade, they *might* obtain as good a rent, or be sold as high, omitting some repairs in the way of restoration, and doing some at a cheaper rate, than would be required by adhering strictly to the covenant. Assuming this to be so, I do not think that it is competent to the defendants so to alter the character of the covenant by which they are bound, as to limit their liability in the way suggested. *Rawlings* v. *Morgan* (1) seems to me to shew that the damages cannot be affected by any such considerations. It was contended there that the lessor could not recover the sum assessed by the jury as the amount of dilapidations because he had agreed to grant another lease and pulled down the premises. The case no doubt was decided upon the ground that no such agreement was established, but I am of opinion that the observations of Montague Smith, J., in that case were really conclusive of the case when he said (p. 784): "The ordinary damages would be the amount which would be necessary to put them in a proper state of repair. The right to damages having accrued on the determination of the term, the lessor's intention to pull down the premises would not in the least affect his right to sue for full damages," and, further on, "If there had been a binding agreement, I doubt whether that would at all have interfered with the plaintiff's right. I cannot see how that should operate in law or good sense as an estoppel." The same doctrine seems to me to be implied in *Davies* v. *Underwood* (2) and other cases referred to in Mr. Mayne's valuable work.

For these reasons I am of opinion that the defendants, who are the representatives of the original covenantors, are liable to the plaintiffs, who are the representatives of the original covenantees,

(1) 18 C. B. (N.S.) 776. (2) 2 H. & N. 570.

for the amounts of 1280*l.* and 400*l.* respectively, assessed by the referee on the principle contended for by the plaintiffs.

I now come to the case of the third party.

It was not contested that he would be liable to the extent of the respective amounts found by the referee, which I should find to be the proper damages as against the defendants, subject to a contention raised by him arising out of the following circumstances:—

On the 5th of June, 1875, the third party and Hankey filed a joint petition for liquidation. A meeting of creditors was held and a receiver appointed, and on the 28th of October, 1875, a resolution for liquidation was passed, and on the 14th of December, a scheme for settlement of the affairs of the partners was approved, and on the 3rd of January, 1876, they received their discharge. As regards the separate creditors of Fothergill, I understood that the arrangement ultimately made was in the nature of a composition. But, whatever the exact nature of the arrangement, in none of the proceedings was any claim either scheduled or made in respect of the possible liability of the third party under the covenant entered into by him on the 19th of July, 1873, nor would it have been possible in 1875 to ascertain the amount of a liability under a covenant to yield up in repair in 1883, which when that time arrived, might turn out not to be broken.

It was contended for the third party that under the very comprehensive words of s. 31 of the Act of 1869 this was a liability present or future, certain or contingent, "to which Fothergill was subject at the time of the proceedings under the petition, or to which he might have become subject during the continuance of the proceedings by reason of an obligation incurred previously, and therefore a "debt provable" within the meaning of s. 31.

On the part of the defendants it was contended that the liability in question was one quite incapable of being fairly estimated at that time, and therefore not one from which Fothergill was discharged.

I am of the latter opinion. I think it would have been wholly impossible for Fothergill or the trustee to have estimated the proper amount with any approximation to accuracy, either "by fixed rules," or on any principle on which a jury could reasonably

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be required to assess it, so as to fall within the words "assessable by a jury," or even "as matter of opinion" in such a sense as to imply a reasonable opinion. In 1875 the lease had eight years to run. As soon as Fothergill had obtained his discharge from all the scheduled liabilities there was no reason to assume that he would not before the expiration of the lease put all the premises into thorough repair according to his covenant, or that the defendants would require to call upon him for any indemnity at all.

I think, therefore, that, looking at the case as one in which a discharge in bankruptcy has been given, that discharge would not have the effect of preventing the defendants from suing the third party in this case. The case of *Robinson* v. *Ommaney* (1) strongly supports this view, where a discharge in bankruptcy was by Kay, J., and the Court of Appeal, held not to cover a liability for a breach of covenant committed after the bankruptcy.

If on the other hand (as was suggested) the case was to be looked upon as one of composition, I am of opinion that it clearly falls within the principle of *Breslauer* v. *Brown* (2). The liability in question never appears to have been thought of by the third party as a liability at the time, nor by the defendants as a matter of claim.

I therefore give judgment for the plaintiffs against the defendants for 168*l*., with costs, and judgment for the defendants against the third parties for the same amount, with costs of plaintiffs and defendants as in *Hornby* v. *Cardwell* (3): The defendant only to pay to the plaintiffs such costs as they are unable to obtain within a month of taxation of their costs against the third party.

Judgment accordingly.

Solicitors for plaintiffs: *Wilkins, Blyth, & Dutton.*
Solicitors for defendants: *Kingsford, Dorman & Co.*
Solicitors for third party: *Field, Roscoe, Field, & Osbaldeston.*

(1) 23 Ch. D. 285. (2) 3 App. Cas. 672.
(3) 8 Q. B. D. 329.

J. S.

MUNTON AND ANOTHER v. LORD TRURO. 1882 June 24

Middlesex, Registration of Deeds—Fees for registering Memorial, &c., under 7 Anne, c. 20.

For registering a memorial of a deed of 200 words in the Middlesex Registry under 7 Anne c. 20, the fees claimed and received were,—1s. for "entry" of the memorial (under s. 11); 1s. 6d. for "administering the oath" of the signing and delivery of the memorial (under s. 5); 1s. for "indorsing a certificate of the said oath upon the memorial, and signing the same" (under s. 5); 1s. for the "certificate indorsed upon the deed to the effect that it had been registered, with the day and hour on which the memorial was entered or registered" (under s. 6):—

Held, that these fees were warranted by the Act.

APPEAL from the Clerkenwell county court.

The action was brought to try the validity of certain fees claimed by the defendant, the registrar of deeds in the county of Middlesex, under 7 Anne, c. 20.

The fees claimed were as follows:—1s. for "entry" of a memorial of a deed containing less than 200 words; 1s. 6d. for "administering the oath" of the signing and delivery of the memorial; 1s. for "indorsing a certificate of the said oath upon the memorial, and signing the same;" 1s. for the "certificate indorsed upon the deed to the effect that it had been registered, with the day and hour on which the memorial was entered or registered." The county court judge decided in favour of the defendant.

April 8, 13. *Reid, Q.C.*, and *William Murray*, for the plaintiffs, contended that the only fee to which the registrar was legally entitled was the fee of 1s. for "entering" or "registering" the memorial, as provided by s. 11 of the Act; all the rest being for duties imposed upon them by the Act, for which no fees were specifically provided. They referred to *Jones* v. *The Mayor of Carmarthen* (1), and the Registration of Deeds in Yorkshire Acts, 2 & 3 Anne, c. 4, s. 13; 6 Anne, c. 20, s. 21; 8 Geo. 2, c. 6, s. 26.

Channell, Q.C., for the defendant, contended that all the fees charged were reasonable and warranted by the statute. He

(1) 8 M. & W. 605.

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referred to *Veale* v. *Priour* (1); *Fleetwood* v. *Finch* (2); *Warberton* v. *Loveland* d. *Ivie*. (3)

The facts and all the material sections of the statute are sufficiently set out in the judgment of the Court (Mathew and A. L. Smith, J.), which was on the 28th of June delivered by

A. L. SMITH, J. This is an action brought to test the validity of certain claims made by the defendant, the registrar of deeds in the county of Middlesex, on behalf of himself and the Treasury, to fees amounting in all to 4*s.* 6*d.*, for administering the oath and registering the memorial of a deed of 199 words in the registry of the said county. It was tried before the learned judge of the Clerkenwell county court, who, with the exception of a 6*d.* claimed, gave judgment in favour of the defendant, allowing the claim.

The facts are as follows:—The plaintiffs took to the registry-office a deed containing 199 words to be registered pursuant to the 7 Anne, c. 20. Therefor the defendant demanded the following fees,—1*s.* 6*d.* for the entry of the deed [It is conceded by both sides, and so held by the judge, that the proper fee for this was 1*s.*, and not 1*s.* 6*d.* as demanded; the extra 6*d.* may therefore be dismissed from further consideration in this case]; 1*s.* 6*d.* for administering the necessary oath; 1*s.* for indorsing a certificate of the said oath upon the memorial, and signing the same; 1*s.* for the certificate indorsed upon the deed, to the effect that it had been registered; which deed so indorsed was thereupon given out to the plaintiffs. The services so charged for were rendered by the defendant.

The question is whether any or all of the charges, amounting to 4*s.* 6*d.*, were lawfully demanded by the defendant; and this depends upon the construction of the 7 Anne, c. 20.

By that Act, which was "An Act for the public registering of memorials of deeds and other documents in the county of Middlesex," it was provided by s. 1 that, unless such memorials be registered of deeds executed after the 29th of September, 1709,

(1) Hardres, 351. (2) 2 H. Bl. 224.
(3) 1 Hudson & Br. 623.

such deeds should be void against subsequent purchasers or mortgagees. By s. 2 it was provided that a public office for registering such memorials should be established in some convenient office, to be provided by the registrars appointed by the Act, in or near some of the Inns of Court or Chancery: and by the same section it was further provided "that the said registrars or their deputies should well and truly do and perform all and every the matters and things intended by this Act to be done and performed." It should be noticed that the office is to be found at the expense of the registrars.

By s. 5 it was enacted that every memorial to be entered and registered should be put into writing and brought to the office, and, in the case of deeds, should be under the hand and seal of some or one of the grantors or some or one of the grantees, attested by two witnesses, one whereof to be one of the witnesses to the execution of the deed; which witness," says the section, "shall upon his oath before one of the said registrars, or before a master in Chancery ordinary or extraordinary, prove the signing and delivery of such memorial; which oath the registrar and masters in Chancery are hereby impowered to administer, and shall indorse a certificate thereof on every such memorial, and sign the same."

By s. 6 it is enacted that every deed of which such memorial is so to be registered shall be produced to the registrars at the time of entering such memorial, who shall indorse a certificate on such deed, and therein mention the day, hour, and time on which such memorial is so entered or registered, expressing also in what book, page, and number the same is entered.

Sect. 11 is as follows:—"And be it further enacted that every such registrar shall be allowed for the entry of every such memorial as is by the Act directed the sum of 1*s.* and no more, in case the same do not exceed 200 words; but, if such memorial shall exceed 200 words, then after the rate and proportion of 6*d.* an hundred for all the words contained in such memorial, over and above the first 200 words: and the like fees for the like number of words contained in every certificate or copy given out of the said office, and no more; and for every search in the said office, 1*s.* and no more."

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There were other sections referred to in the argument which need not be set forth further here.

Mr. Reid, on behalf of the plaintiffs, contended that the defendant for the whole of the services he rendered in the present case was only entitled to the sum of 1*s.* and no more, the memorial not exceeding 200 words. He contended that when a public servant was directed by statute to do specific work, he could only get that remuneration for the work so rendered which the statute ordained that he should have; and he cited, amongst other cases, *Jones* v. *Mayor of Carmarthen* (1) in that behalf. He contended that, upon the true construction of the statute of Anne, the registrar was only entitled to charge the fees prescribed by s. 11.

It is true that that section enacts that for entry of every memorial, if under 200 words, he was to have 1*s.* and no more, and that for every certificate given out of the office, if under 200 words, he was to have 1*s.* and no more, and also for every search the sum of 1*s.* and no more. But, what about the administering of the oath as prescribed by s. 5, and without which the memorial could not be registered at all? By s. 5 it is manifest that that oath may be taken either before one of the registrars or before a master in Chancery ordinary or extraordinary. It must be taken before one or the other. If taken before a master in Chancery, it is admitted that the 1*s.* 6*d.* fee could be lawfully charged. No one disputes this: and it was not disputed at the Bar. It was however said, if taken before the registrar, no fee could be demanded. Why? Because, say the plaintiffs, it is covered by s. 11. But the first answer, as it appears to us, is, that s. 11 in no way deals with the administering of the oath. It is s. 5 and that alone which deals with this. If, then, the master in Chancery administering the oath under s. 5 is entitled to the 1*s.* 6*d.*, why is not the registrar when he performs the same act? It is contended that he is not, because, it is argued, the word "entry" in s. 11 covers and includes the administering of the oath. But, is this so? Until the oath is taken, there is to be no entering of the memorial at all. In our judgment the word "entry" in s. 11 does not include the act of administering of the necessary oath to the requisite party; and we are against the plaintiffs as to this.

(1) 8 M. & W. 605.

It seems to us, too, as was said by the learned county court judge, that it would be a strange anomaly to hold that the charge of the registrar should be precisely the same whether the necessary oath was administered by the master and paid for to him, or whether it was administered by the registrar himself.

In our judgment, s. 11 is not exhaustive of all the fees the registrar is entitled to; and the defendant is entitled by the statute of Anne to charge for administering the oath; and there is no doubt that the 1*s.* 6*d.* is a reasonable sum so to charge: see Order as to Supreme Court Fees, 1884, title "Oaths."

Now, as to the fee of 1*s.* for indorsing the certificate of the oath upon the memorial and signing the same, as is prescribed by s. 5, this charge, as it seems to us, may be supported upon the grounds above mentioned as to the 1*s.* 6*d.*

Then, as to the fee of 1*s.* for the certificate indorsed upon the deed to the effect that it had been registered, which deed so indorsed was thereupon given out of the office to the applicant pursuant to s. 6. In our judgment this 1*s.*, and also the 1*s.* for indorsing the certificate of the date upon the memorial, can be supported upon the ground that it comes within the very terms of s. 11, viz., "Every certificate or copy given out of the said office."

It was argued that the certificate mentioned in this section could not mean the certificates we are now dealing with, because the section contemplated certificates of some length, and possibly of more than 200 words; and it was suggested that the certificate contemplated in this section was the certificate mentioned in s. 19. We do not agree. The words of s. 11 are "Every certificate given out of the office," and in our judgment include all sorts of certificates, long and short, and of whatever length, given out of the office.

We should notice also, that, although the practice as to the taking of the fees by the office has not been uniform, yet evidence was given which undoubtedly shewed that the case now made by the plaintiffs, viz. that the whole of the work executed by the defendant was to be done for 1*s.*, was not the course of practice as it has existed for nearly a century and a half. It is true that the fees taken do not tally exactly with those now claimed: but

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good reason, as it seemed to us, was given by Mr. Channell to account for this, to which we need not now allude; for, as it will appear from the above, we do not found our judgment upon any contemporaneous exposition of the statute of Anne; but all we say is, that, if the evidence given in this case is to be looked at at all, in our judgment it is far more in favour of the defendant's contention than that of the plaintiffs. Fees from time immemorial largely in excess of the plaintiffs' contention have been taken in the office, though not as it would appear identical with those now claimed.

In our judgment, the learned county court judge arrived at a correct decision. We affirm him, and give judgment for the defendant, with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *Munton & Morris.*
Solicitors for defendant: *Wainwright & Baillie.*

J. S.

April 6; *June* 11.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE JUDGE OF THE BLOOMSBURY COUNTY COURT.

Parliamentary Election—Returning Officer's Charges—Taxation—Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 *Vict. c.* 84), *s.* 4—*Application to "the Court," what is.*

Sect. 4 of 38 & 39 Vict. c. 84, enacts that an application to tax the charges of the returning officer at a parliamentary election may be made, within fourteen days from the delivery of his account, to the county court having jurisdiction at the place of nomination for the election:—

Held, that an application made within the specified time to the registrar of the county court when the judge was not sitting, was properly made within s. 4.

APPLICATION to the Bloomsbury County Court for a taxation of the charges of the returning officer at the election of members of parliament for the Harrow division of the county of Middlesex, under 38 & 39 Vict. c. 84, s. 4.

The account was sent to the candidates on the 30th of December, 1885, amounting to 698*l.* 15*s.* On the 31st of December,

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a notice, dated the 30th of December, addressed to the registrar of the Bloomsbury County Court, and signed by the two candidates, was delivered at the offices of the court, requesting an appointment to tax the returning officer's charges, and was duly filed by the registrar, who fixed Tuesday, the 5th of January, 1886, to proceed with the taxation. The judge was away at the time, and the registrar had no means of communicating with him: and, doubting his power to give the appointment in the absence of the judge, the registrar withdrew it; and, on the judge's return, he after the lapse of fourteen days from the delivery of the notice obtained from him a fresh appointment, and a direction to him (the registrar) to proceed to tax. Thereupon the returning officer obtained a rule nisi for a prohibition, against which,

R. Henn Collins, Q.C. (*Pownall*, with him), shewed cause on behalf of Mr. Waddy, one of the candidates. The notice to the registrar was given in due time and to the proper person; the registrar being the proper person to receive and file all proceedings in the county court. Sect. 4, sub-s. 3, of the Act in question directs the application for a taxation to be made to "the Court as defined in this section;" and the definition is, "the Court for the purposes of this Act shall be in the city of London the Lord Mayor's Court, and elsewhere in England the county court having jurisdiction at the place of nomination for the election to which the proceedings relate." To the "Court" does not mean to the judge personally, but to the officer through whom all applications to the Court are made: 9 & 10 Vict. c. 95, ss. 24–30. [He also referred to the County Court Rules of 1875.]

Bonsey, appeared for Mr. Milner, the other candidate.

R. G. Glenn, (*Sir R. Webster, Q.C.*, with him), in support of the rule. The County Court Rules of 1875 came into force after the passing of the Act in question; and all the powers of the registrar are limited to matters of procedure. By s. 4, sub-s. 3, of the Act, the application for an order to tax the charges of the returning officer must be made within fourteen days from the delivery of the account, and to the judge himself; and no one has power to enlarge the time. The judge is to exercise his discretion as to the time and place and mode of taxation. It is true he may

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delegate the duty of taxing the charges to the registrar: but that delegation must be the act of "the Court." The registrar is not the Court. No inconvenience can arise from the temporary absence of the judge, seeing that any other county court judge might act for him: see 30 & 31 Vict. c. 142, s. 20.

DENMAN, J. I think we have no power to extend the time for making the application to the county court judge for a taxation of the account of the returning officer's charges, under the 4th section of the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84). So far I agree with Mr. Glenn: but I cannot go along with him in his contention as to the manner in which the application to "the Court" is to be made. There is no magic in the words "apply to the Court." They are to be construed with reference to the practice of the court and the intention of the legislature and the rights of the parties. I think we should be doing injustice, and departing from the intention of the legislature, as well as violating the practice of the Court, if we held that the notice of the 30th of December, 1885, was not an application to the Court under s. 4. It is well known that county courts are courts existing in great numbers all over the country, one judge being sometimes appointed to preside over twelve or more courts. The judge is ambulatory. The registrar, on the contrary, is (since 19 & 20 Vict. c. 108) confined to his own particular court, where he is bound, except on holidays, to attend daily to transact the ordinary business of his office. The expression "the Court" must therefore be construed with reference to this state of things. This being so, the registrar is the person to whom one would naturally go for the purpose of an appointment to tax. The legislature being aware of this, there comes an Act enabling candidates at parliamentary elections to have the returning officer's charges taxed. The judge may be away performing his ordinary duties in another court. The section enacts that, if the person from whom payment is claimed objects to any part of the claim, he may at any time *within fourteen days* from the time when the account is transmitted to him apply to the (county) Court for a taxation, and the Court shall have jurisdiction to tax the account in such manner and at such time and place as the

Court thinks fit, &c. The person to tax would in the first place be the judge; but he may delegate that duty to the registrar. It does not, however, follow thence that for the purpose of the notice of the candidate's desire to have the account taxed there shall be a direct application to the Court in a formal manner. There are many cases in the superior courts where an application to the Court does not mean a formal application to the judge or judges in open court, but to the judge's clerk or to a master. What is the object to be attained here? It is simply that the account shall be taxed. What is required for that purpose? The notice of the candidate's desire to have the account examined shall be given to the person whose business it is to receive all notices, and who is always present at the offices of the court. It seems to me that that is abundantly sufficient to enable everything to be done which is required under this Act. The registrar here did get a notice in due time, signed by both the candidates, requiring him to appoint a time and place for the taxation. This taxation the candidates have an absolute right to require; and nothing is necessary to be done by them but to convey to the Court that such is their desire. There is no necessity for a formal notice. It is said that there is a discretion in the Court to order a taxation. I apprehend that cannot be so. There are many cases where the very subject-matter prevents it from being so, otherwise the Court would be placed in an extraordinary and embarrassing position. The registrar, it seems, did in pursuance of the notice appoint a day for the taxation. He did that erroneously. Finding he was wrong, he brought the application properly before the judge; and the judge made an order referring the account to the registrar for taxation. I think nothing has been done to render it improper for the judge to make that order. I think both the registrar and the judge took the right course, and that there is no ground for this application.

WILLS, J. I am of the same opinion, and I entertain no doubt whatever. When the 38 & 39 Vict. c. 84, was passed the legislature must have perfectly well known that there are county courts all over the kingdom where the judge sits only periodically. That being so, one should be slow to think they would have

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passed an enactment the effect of which would be virtually to deprive parties of the right which the statute itself has created, which would be the case if the 4th section is to be construed in the strict sense for which the returning officer contends, viz. that the application for a taxation of the returning officer's charges must be made to the judge personally sitting in court. I see no necessity for holding anything of the kind. It is said that no practical inconvenience can arise, seeing that any county court judge may sit for any other county court judge: 19 & 20 Vict. c. 108, s. 6. That, however, must be at the request of the judge. Turning to the county court rules in force when this Act was passed I find that the registrar is required to keep an office which shall be open every day from ten o'clock in the morning until four o'clock in the afternoon, except on Saturday, when the closing hour is one o'clock, and except on the usual holidays (rule 6); and he is also required (by s. 27 of 9 & 10 Vict. c. 95, and rule 11) to issue all summonses, warrants, precepts, and writs of execution, and to register all orders and judgments of the Court, and keep an account of proceedings of the Court, &c. And, whereas the registrar might formerly have been registrar of several courts of a district, now, by 19 & 20 Vict. c. 108, s. 8, he is confined to one court; and by 13 & 14 Vict. c. 61, s. 3, he is required to reside within the district for which he is appointed. If, then, the registrar is to issue all process and record all the proceedings of the Court, why should he not be the proper person to whom an application of this sort should be addressed? It is obviously more convenient that the application should be made to one who is always on the spot, than that it should be made to the judge, who is often necessarily elsewhere. The county court is the old county court remodelled by statute: neither the judge per se nor the registrar is the Court. I see no difficulty in giving to s. 4 of the Act of 1875 the construction which convenience and good sense requires to be given to it. The rule must be discharged, with costs.

Rule discharged.

J. S.

The returning officer appealed.

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1886. June 11. *R. G. Glenn* (*Rose-Innes*, with him), for the returning officer, argued as in the Court below.

R. Henn Collins, Q.C. (*W. B. Ferguson*, with him), and *E. W. Garrett*, for the candidates, were not heard.

LORD HERSCHELL, L.C. I am of opinion that the judgment of the Queen's Bench Division should be affirmed. The 4th section of 38 & 39 Vict. c. 84, provides that if a person from whom payment is claimed by the returning officer objects to the claim, he may at any time within fourteen days from the time when the account is transmitted to him, apply to the county court, having jurisdiction at the place of nomination for the election, for a taxation of the account. Here the application was made by letter, dated the 30th of December, 1885, from the candidates' solicitors, stating that they "hereby request that a day may be fixed for taxation of the returning officer's charges." That application was made within the fourteen days prescribed by the Act. The county court judge was not then sitting. It was not known where he was, and he was not to sit again until the 25th of January, 1886. It has been argued that the application under the 4th section must be made to the judge sitting in court. Now the legislature knew, when this Act was passed, that the judge of a county court sits at intervals only, whilst the registrar is always there. If the construction contended for on behalf of the returning officer be right, in many cases it would be impossible to obtain any taxation at all, because impossible to comply with the provisions of the section. That result cannot have been intended by the legislature. It is said that by s. 20 of 30 & 31 Vict. c. 142, one county court judge is enabled to do the work of another, when sitting out of that other's jurisdiction, so that the application could be made to any county court judge. I doubt extremely whether that section applies where a statute says, as s. 4 of 38 & 39 Vict. c. 84, says, that application must be made to the county court "having jurisdiction at the place of nomination for the election to which the proceedings relate." I see nothing to prevent s. 4 from meaning that the application may be made by intimating to the proper officer of the Court that the candidates

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do so apply. I am, therefore, of opinion that this application was properly made within s. 4. There is nothing in the statute to shew that the judge must deal with the application in any limited time, and, having been properly made, he had jurisdiction to deal with it as he did.

LORD ESHER, M.R. I am of the same opinion. I agree that the legislature must have known that county court judges only sit at intervals, whilst the registrar, as Denman, J., pointed out in the Court below, is confined to his own particular court, where he is bound to sit daily except on holidays.

FRY, L.J. I am of the same opinion. I agree with what Wills, J., said in the Court below, that neither the judge per se, nor the registrar, is "the Court." The appeal must be dismissed.

Appeal dismissed.

Solicitors for the returning officer: *Rose-Innes, Son, & Crick.*

Solicitors for the candidates: *Hepburn, Sons, & Cutliffe*, and *Warburton & De Paula.*

W. A.

Referred to. TAMLIN *v.* HANNAFORD [1950] 1 K. B. 18

GILBERT AND ANOTHER *v.* THE CORPORATION OF TRINITY HOUSE. 1886

June 11.

Negligence—Liability—Corporation performing Public Duties—Servants of the Crown—Trinity House—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *Parts VI. and VII.*

By the Merchant Shipping Act, 1854, the superintendence and management of all lighthouses and beacons in England and the adjacent seas are vested in the Trinity House, subject to the existing jurisdiction of local lighthouse authorities: the Trinity House shall continue to hold and maintain all property vested in them in the same manner and for the same purposes as they have hitherto held and maintained the same, and extensive powers are given to them, to be exercised with the consent of the Board of Trade, in respect of the management and control of lighthouses and beacons which are subject to the jurisdiction of local authorities, and in other respects. The Act further provides that the light dues levied by the Trinity House shall be carried to the account of the Mercantile Marine Fund; that the expenses incurred in respect of the service of lighthouses and beacons shall be paid out of that fund; that the Trinity House shall account to the Board of Trade for their receipts and expenditure, and that their accounts shall be audited by the Commissioners of Audit:—

Held, that the Corporation of Trinity House were not by virtue of the Merchant Shipping Act, 1854, constituted servants of the Crown so as to exempt them from liability to an action for negligence in the performance of their duties.

A beacon vested in the Corporation of Trinity House having become partially destroyed, they licensed G. to remove it, and in so doing he negligently left an iron stump sticking up under water. In an action to recover damages caused thereby to the plaintiffs' ship:—

Held, that the defendants were liable for G.'s negligence.

MOTION to set aside the verdict and judgment obtained by the plaintiffs in an action tried before Grove, J., and a jury, and for a new trial, or to enter judgment for the defendants.

Claim for damages in respect of injuries to the plaintiffs' vessel and cargo by reason of the negligence of the defendants, or their servants, in not having removed part of an old beacon, the property of and vested in the defendants.

Defence (inter alia), that the beacon was not the property of or vested in the defendants; that they were not liable in respect of any damage occurring as alleged in the statement of claim, there being no duty imposed upon them to remove the part of the beacon; and that the defendants were not liable in respect of

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any damage caused by defective beacons, or by parts of the same being misplaced or carried away.

At the trial it appeared that prior to 1861 the beacon in question was the property of the defendants, and vested in them. In 1861 it had been partially destroyed, and one Griffiths applied to the defendants for permission to remove what remained of it. The defendants gave Griffiths permission to do so, and he removed part, but left an iron stump hidden by water. The plaintiffs' vessel ran upon the stump and was injured.

Grove, J., left the case to the jury, and in answer to questions put to them by the learned judge they found that the stump was a danger to navigation; that the plaintiffs' vessel was injured by reason of the negligence of the defendants or some one for whose negligence they were responsible; that Griffiths acted under their authority; and that there was no negligence on the part of the captain of the vessel. They also found a general verdict for the plaintiffs, and Grove, J., gave judgment accordingly.

The grounds stated in the defendants' notice of motion were, misdirection in leaving the case to the jury, and that the judgment was wrong by reason that the facts proved at the trial disclosed no legal liability on the part of the defendants.

Sir W. Phillimore, Q.C., and *E. U. Bullen*, for the defendants. The learned judge at the trial ought not to have left the case to the jury. The defendants were in the position of servants of the Crown, and therefore not liable for the negligence of Griffiths, even if he was their servant. The authority of the Corporation of Trinity House in respect of the control of lighthouses and beacons has been of gradual growth for a very long period of time before the year 1854. Originally it would seem that beacons on our coasts were for the most part private property. In order to prevent these means of safety to mariners being neglected in private hands, the guild or fraternity of the Elder Brethren of Trinity House repaired and maintained beacons, at first, perhaps, as a charity, and in process of time acquired rights in respect of the control and management of them. In 1836 many of the lighthouses and beacons on the coasts were under the control and management of local bodies to whom they had been leased by the

Crown; and by 6 & 7 Will. 4, c. 79, repealed by the Merchant Shipping Act, 1854, those lighthouses and beacons were vested in the Corporation of Trinity House. By charters of 1514 (6 Hen. 8) and 1685 (1 Jac. 2) powers were given to the Brethren of Trinity House to hold lands of a certain value, and thereout to pay a chaplain to perform certain religious offices. "Loads manage, pilotage, primage, buoyage, &c.," were also granted to them, and the amount of the dues to be received in respect thereof were specified, and the dues so received were to be expended in repairing almshouses, and for the relief of poor brethren and sisters and seafaring men. It would seem that up to the year 1854 the brethren took the dues for their own use, but that was put an end to by the Merchant Shipping Act, 1854, the effect of which statute is to make the corporation mere collectors of the dues payable in respect of lighthouses and beacons. By s. 389 the superintendence and management of all lighthouses, buoys, and beacons in England, &c., and the adjacent seas and islands, shall be vested in the Trinity House, subject to the existing jurisdiction of local lighthouse authorities. They are termed, together with other bodies "General Lighthouse Authorities;" and, subject to the provisions of the Act, shall continue to hold and maintain all property now vested in them in that behalf in the same manner and for the same purposes as they have hitherto held and maintained the same. By s. 417 all light dues or other sums received by or accruing to the Trinity House are to be carried to the Mercantile Marine Fund. By s. 420 the establishments of the General Lighthouse Authorities, on account of the services of lighthouses, buoys, and beacons, are to be fixed by Her Majesty in Council; and no increase of any establishment or part of an establishment so fixed shall be made without the consent of the Board of Trade. By s. 422 each of the general lighthouse authorities shall submit to the Board of Trade estimates of all expenses to be incurred by them in respect of the matters aforesaid, and the Board of Trade shall consider and may approve such estimates, and by s. 423 no expense is to be allowed unless sanctioned by the Board of Trade. By s. 424, for the purpose of erecting and repairing lighthouses, and other extraordinary expenses connected with the same services, the Treasury may, upon

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the application of the Board of Trade, advance sums out of the Consolidated Fund of the United Kingdom, and pay the same into the Mercantile Marine Account. By s. 428 the accounts of the whole of the receipts and expenditure of the Mercantile Marine Fund are periodically to be audited by the Commissioners of Audit. Under these enactments the defendants, it is contended, are simply the hands to collect the dues, and to expend the sums received in the erection, maintenance, and repair of lighthouses, &c., as they may be allowed by the Board of Trade. They get no profit in any sense. They are not in the position of a body making profits, and having a local destination for those profits. Whatever they receive or expend affects the whole country, not one locality only, and in this respect they differ from the position, with respect to lighthouses vested in them, of the trustees of the Mersey Docks: *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian.* (1) They are in the position of a government department, such as the Board of Trade, or of a great officer of the state, such as the Secretary of State for War, or the Postmaster General.

[WILLS, J. According to your contention s. 430 of the Merchant Shipping Act, 1854, which exempts the Trinity House from payment of rates, is unnecessary.]

That section is merely declaratory of the law.

[WILLS, J. The defendants have been sued for negligence in *Romney Marsh* v. *Corporation of Trinity House.* (2)]

In that case they were sued as shipowners, the negligence being that of one of their servants in managing a pilot-cutter, but they are not liable to be sued for negligence in performing one of the functions of government entrusted to them. The great officers of state may be sued in some other capacity. Proceedings have been taken against the Secretary of State for War in respect of his capacity to hold lands: *Kirk* v. *The Queen.* (3) So also against the Secretary of State for India. The Corporation of Trinity House is not a substitution for private enterprise, nor is it a corporation formed for trading or other profitable purposes, as were the Mersey Docks Trustees: *Mersey Docks Trustees* v.

(1) 14 Q. B. D. 770. (2) Law Rep. 5 Ex. 204; 7 Ex. 247.
(3) Law Rep. 14 Eq. 558.

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Gibbs. (1) The foundation of the judgments in that case is that the trustees were not a public body acting for the whole nation, as, it is contended, the defendants here are. The true test whether the privilege of the Crown applies is stated in the judgments of the House of Lords in the leading case, *Mersey Docks* v. *Cameron.* (2) The defendants here are constituted for "public purposes such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown." If that be so, the defendants, being servants of the Crown, entrusted with the performance of public functions, are not liable for the negligence of an inferior servant of the Crown. The principles should be applied of *Nicholson* v. *Mounsey* (3), *Lane* v. *Cotton* (4), *Whitfield* v. *Le Despencer* (5), *Mersey Docks Trustees* v. *Gibbs* (6), *Coe* v. *Wise* (7), and *Forbes* v. *Lea Conservancy Board.* (8) Griffiths was at most a mere licensee of the defendants to remove the beacon, and they having sold what remained of it to him, were not liable for his acts: *Bartlett* v. *Baker.* (9)

Pyke, (*Bucknill, Q.C.,* with him), for the plaintiffs, was not called on.

DAY, J. In this case two questions arise. First, are the defendants liable to be sued at all in respect of injuries caused by reason of the negligent condition in which beacons, or the remains of beacons, vested in them are kept? Secondly, is there any evidence of negligence on the part of a person for whom the defendants could be held responsible? I entertain no doubt whatever on the first point. The law is plain that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation

(1) Law Rep. 1 H. L. 93.
(2) 11 H. L. 443. Judgment of Lord Westbury at pp. 504, 505, and of Lord Cranworth at p. 508.
(3) 15 East, 384.
(4) 1 Ld. Raym. 646.
(5) 2 Cowp. 754.
(6) Law Rep. 1 H. L. 93. Judgment of Blackburn, J., at p. 111.
(7) 5 B. & S. 440.
(8) 4 Ex. D. 116.
(9) 3 H. & C. 153; 34 L. J. (Ex.) 8.

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or an individual who has undertaken to discharge them. It is also immaterial whether the person is guilty of negligence by himself or by his servants. If he elects to perform the duties by his servants, if in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own. As to persons who have undertaken duties of a public character, and discharge them without profit or emolument, take the case cited in argument, *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian* (1). Now to my mind it would have made no difference in that decision if the Commissioners for the Mersey Docks had been amalgamated into one commission with the commissioners of any number of other docks. It is not because they have more duties to discharge that they are less liable for the consequence of their negligence. It is not because they have more opportunities of doing wrong that they are to be less liable to make compensation for the wrong when they have done it. In the same way I can see no difference in the liability of persons who have undertaken the discharge of duties in respect of 50 or 500 lighthouses than if they have undertaken the discharge of duties in respect of one. As to the history of Trinity House, I have no doubt it is true that it has grown up gradually with the amalgamation of lights or beacons which were at one time almost universally private property. Persons erected beacons or lighthouses where they were required, and those who navigated the seas, at first perhaps voluntarily and afterwards by compulsion, paid tolls in respect of those beacons and lighthouses. Rights gradually grew up; rights recognised by law; rights enforced, it may be, by charters or by Acts of Parliament. With the gradual development of those rights it became necessary at last to bring all those lighthouses and beacons under one general authority, and eventually in 1854, the whole system, and the whole law with respect to them, was more or less amalgamated. They were all brought under the one central authority of the Trinity Board, which had long had an existence, originally as a private body, and gradually and naturally developing its authority and influence and acquiring fresh powers, until at length all lighthouses and

(1) 14 Q. B. D. 770.

beacons (including the beacon in question) were vested in it. Now does all this cause the Trinity Board to be servants of the Crown? I cannot conceive that they represent the Crown as servants any more because they deal with all the lighthouses and beacons than the Board of the Mersey Docks represent the Crown because they deal with the lighthouses in the port of Liverpool, or the harbour of the Mersey. The Trinity House, to my mind, is not in the position of a great officer of state. It is nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority. In my judgment, therefore, the defendants are liable like any other body for their own negligence, or the negligence of their servants, for it may be difficult to see how a corporation could itself be guilty of negligence.

Next, was there any negligence here? The beacon was undoubtedly vested in the defendants. I agree that if the defendants were not responsible for the condition of beacons throughout the country, not charged with the duty of maintaining them in a safe state, they could, by parting with the beacons, evade responsibility. But that is not the position of the defendants. They are responsible for the safe and due maintenance of these things. Here they gave Griffiths leave to take the beacon away. He never did take it away. He only took a part of it, and left the rest. The defendants were responsible for the care of what remained, and it is by neglecting the care of what remained that this accident has occurred. I cannot doubt that there was negligence in allowing the stump which caused the injury to remain where it was. I am, therefore, of opinion that they are clearly

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responsible in an action for the damages which the plaintiffs have sustained.

In my judgment the verdict ought to stand, and the judgment was correct.

WILLS, J. I am of the same opinion. Two objections have been taken to the verdict and judgment. The first is that the Corporation of Trinity House cannot be sued in respect of the negligence alleged against them by the plaintiffs. It is sought to put them on the level of great officers of the state, who cannot be sued because they are the servants of the Crown. I am of opinion that the defendants' counsel have altogether failed to shew any facts, or anything in the constitution and history of the Trinity House, or in the legislation affecting it, which entitles us to consider it on the same footing as a great officer or a great department of the state. We have had brought before us the whole history of the Trinity House, and the charters and Acts of Parliament affecting it, and it would seem that at first it was a private guild or corporation. Now at what time did it cease to be so, and become a great representative of the state? It is suggested that that effect was produced by virtue of two statutes, one of which vested a number of lighthouses and beacons along the coasts in the corporation, and the other—the Merchant Shipping Act, 1854—contained very specific provisions for the control of lighthouses and beacons, and the administration of the funds realised by the tolls collected in respect of them. I am of opinion that those statutes in no sense altered the constitution or capacities of the corporation itself. They imposed new duties upon it; they gave it new powers, and subjected the administration of its funds to certain conditions, but that was all. The Trinity House remains exactly what it was before those statutes were passed, and to my mind is no more to be considered as representing a great officer of the state than are the Ecclesiastical Commissioners, or the Copyhold Commissioners, or any other similar body. I therefore see no reason for saying that the Trinity House cannot be sued; and if it be necessary to fortify that opinion, it certainly is fortified by the fact that the Trinity House has been successfully sued. In *Romney Marsh* v. *Corporation of*

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Trinity House (1), the corporation was successfully sued for an act which seems to me undistinguishable in principle from the act or neglect which founds the cause of action in the present case. They were the owners of a pilot cutter, which, being negligently managed by their servants, was driven against the plaintiffs' wall, and it was held that the defendants were liable. I do not mean to say that the question raised in the present case was argued and discussed there. I suppose that at that time it did not occur to any one to argue it, though the defendants were represented by very able counsel. That case went to the Exchequer Chamber, and the judgment of the Court below was affirmed; and it is certainly remarkable that, if the proposition for which the defendants' counsel have contended before this Court were well founded, the same objection should not have been taken in the Exchequer Chamber. The contention that there may be certain purposes in respect of which the Trinity House must be regarded as a private corporation, and other purposes in respect of which it must be regarded as a great department of state, appears to me singularly untenable. The common law furnishes no such instance of a composite person or corporation, and I can hardly conceive that any person or corporation can have that duplicate capacity vested in them by statute. It was said on behalf of the defendants that the Secretary of State for India has been held liable to be sued under certain circumstances, and has been held not so liable under certain other circumstances. I have not had the opportunity of testing that analogy by getting to the root of the illustration, but I suspect that it would be found that in the cases in which he has been made party to an action as defendant (if the fact be so), it was by virtue of some statute transferring to him the liabilities of the East India Company, and that the right to sue him was given by the statute. I am clear that at common law there is no instance of any person or body having two distinct capacities—in one of which there is no liability to be sued because the person or body is the direct representative of the Crown, and in the other there is a liability to be sued because the capacity is that of a private corporation or a person.

(1) Law Rep. 5 Ex. 204; 7 Ex. 207.

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The remaining question is, whether there was any negligence in this case which would make the defendants liable. I cannot doubt that there was. It is conceded that the beacon in question was vested in the defendants. It does not cease to be vested in them because they cease to use it. Under such circumstances their statutory right is to remove it. Here, instead of doing that, they gave permission to Griffiths to remove it. In my opinion they cannot get rid of their liability by allowing somebody else to do that which, if unlawfully done by themselves, would have subjected them to a right of action, namely, to alter the premises vested in them in such a way as to leave them a trap and a source of inevitable danger to persons using the seas. They have allowed somebody else so to deal with their property as to convert a thing which before was perfectly safe into a source of hidden and certain danger. As long as the stump remained there it was vested in the defendants, because nothing was done to divest it, and being vested in them it was their duty to take care that it was in such a condition as not to cause injury to others. For these reasons I am of opinion that both the objections taken by the defendants fail.

Motion dismissed.

Solicitor for plaintiffs: *R. S. Fraser.*

Solicitors for defendants: *Sandilands, Humphrey, Armstrong, & Jackson.*

W. A.

PHILLIPS AND ANOTHER, PETITIONERS; GOFF, RESPONDENT. 1886 Aug. 10.

Elementary Education Acts—Election of School Board—Vote—Ballot Papers, validity of—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *Sched. II.—Elementary Education Act*, 1873 (36 & 37 *Vict. c.* 86), *Sched. II.—General Order of Education Department of Nov.* 26, 1884.

The Ballot Act, 1872, Sched. II., which applies to municipal elections, directs that a voter shall vote by placing a cross on the right hand side of the ballot paper opposite the name of each candidate for whom he votes. A General Order of the Education Department made under the Elementary Education Acts provides that the poll at elections of school boards in boroughs shall be conducted in like manner as the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and the provisions of that Act shall, subject to the provisions of this Order, apply to elections of school boards, provided that—"Every voter shall be entitled to a number of votes equal to the number of the members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he thinks fit. The voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidate in lieu of a cross, and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly:"—

Held, applying the principle of *Woodward* v. *Sarsons* (Law Rep. 10 C. P. 733), that the provisions of the General Order and of the Ballot Act, 1872, were sufficiently complied with where ballot papers at the election of a school board in a borough were marked otherwise than in the mode prescribed by the Order, if it could be ascertained with reasonable certainty for whom the voter in each case intended to vote, and how many votes he intended to give, and if it appeared that he had not intended to give a greater number of votes than there were members of the school board to be elected.

Applying the above principles, the Court held that ballot papers marked by placing crosses instead of figures, or crosses and figures, or single strokes, opposite the names of candidates, were valid.

CASE stated by a commissioner appointed for the trial of municipal election petitions.

1. This is a petition under the Municipal Corporations Act, 1882, and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, against the return of the respondent as a member of the School Board for the borough of Southampton, tried before me on the 20th, 21st, and 22nd of June, 1886.

2. The election of members of the school board for the said borough was holden on the 8th day of March, 1886, when . . . (ten

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names were here set forth) and the respondent were declared to be duly elected.

3. The petition alleged that the number of votes declared by the returning officer to have been given at the said election for the respondent, who stood lowest of the successful candidates on the poll, was 1321, and that the number of votes declared by the returning officer to have been given for the petitioners, who stood next on the poll, as declared, to the respondent, and who were declared not to have been elected, was as follows: for the petitioner Charles John Phillips, 1310; for the petitioner Thomas Morgan, 1308.

4. The petition further alleged that the returning officer erroneously received and counted as votes for the respondent certain ballot papers which were not marked in compliance with the provisions of the law in that behalf, and were in some cases void for uncertainty, and in other cases bore writings or marks by which the voter could be identified.

5. The petition prayed that a scrutiny and re-count might be had of the votes given or counted at the said election for the respondent and petitioners respectively, and that it might be determined that the respondent was not duly elected or returned, and that either Charles John Phillips or Thomas Morgan was duly elected and ought to have been returned.

6. By the 2nd schedule to the Ballot Act, 1872 (35 & 36 Vict. c. 33), which is continued by the Expiring Laws Continuance Act, 1885 (48 & 49 Vict. c. 59), until the 31st of December, 1886, under the head of "Form of Directions for the Guidance of a Voter in Voting," which shall be printed in conspicuous characters and placarded outside every polling station, and in every compartment of every polling station, it is enacted (inter alia) that:—

"The voter may vote for candidate.

"The voter will go into one of the compartments and with the pencil provided in the compartment place a cross on the right hand side opposite the name of each candidate for whom he votes, thus ×.

"If the voter inadvertently spoils a ballot paper he can return it to the officer, who will, if satisfied of such inadvertence, give him another paper.

"If the voter votes for more than candidate, or places any mark on the paper by which he may afterwards be identified, the ballot paper will be void and will not be counted.

"Note.—These directions shall be illustrated by examples of the ballot paper."

7. By the 2nd schedule to the Elementary Education Act, 1873 (36 & 37 Vict. 86), under the head of "Rules respecting Election of Members of a School Board," it is enacted that—

"1. The election of a school board shall be held at such time and in such manner and in accordance with such regulations as the Education Department may from time to time by order prescribe, and the Education Department may by order appoint or direct the appointment and make regulations as to the duties, remuneration, and expenses of any officers requisite for the purpose of such election, and do and make regulations respecting all other necessary things preliminary or incidental to such election, and revoke or alter any previous order, whether confirmed by or made in pursuance of this Act."

"Provided as follows:—

"(*b.*) Any poll shall so far as circumstances admit be conducted in like manner in which the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and subject to any exceptions or modifications contained in any order of the Education Department made in pursuance of this Act, the Ballot Act, 1872, shall apply in the case of the election of a school board in like manner as if the provisions thereof were herein enacted with the substitution of 'school board election' for 'municipal election.'

"3. An order made in pursuance of this schedule shall, save as otherwise provided by such order, apply to all school boards."

8. On the 26th of November, 1884, the Education Department, by virtue and in pursuance of the powers in them vested under the Elementary Education Acts, 1870 and 1873 (33 & 34

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Vict. c. 75, and 36 & 37 Vict. c. 86), published a general order regulating the triennial election of a school board in a borough, by which it was ordered (inter alia) as follows:—

"Subject to the provisions of this order the poll shall be conducted in like manner as a poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and, subject as aforesaid, the provisions of that Act shall apply to the election in like manner as if they were contained in this order with the substitution of the term 'school board election' for the term 'municipal election,' provided that—

"(*a.*) Every voter shall be entitled to a number of votes equal to the number of the members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he thinks fit.

"(*b.*) The voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidate in lieu of a cross, and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly."

A copy of the said order is appended hereto, as well as a copy of the directions for the guidance of the voter in voting issued by the said returning officer and dated the 3rd of March, 1886.

[The directions issued by the returning officer were (inter alia) as follows:—

"Directions for the guidance of the voter in voting.

"Each voter has eleven votes, all of which he may give to one candidate, or he may distribute all or some of them among the candidates as he thinks fit.

"The voter will go into one of the compartments, and, with the pencil provided in the compartment, place on the right hand side, opposite the name of any candidate for whom he votes, the number of votes he gives to such candidate.

"If the voter give more than eleven votes, or place any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted."]

9. By s. 58 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), it is enacted that in the case of a contested municipal

election the poll shall, as far as circumstances admit, be conducted as the poll at a contested parliamentary election is by the Ballot Act, 1872, directed to be conducted.

10. At the said election there were eleven members to be elected, and fourteen candidates; each voter had consequently eleven votes, all of which he might give to one candidate or might distribute them among eleven, or any less number of candidates as he might think fit.

11. Upon the trial of the said petition with the consent of both the petitioners and the respondent, and of the barrister acting as the representative of the Director of Public Prosecutions, I personally scrutinised the ballot papers in order to count the votes.

12. Upon scrutinising the ballot papers there appeared some marked as follows (exempli gratiâ):—

(*a.*) A single cross opposite the name of a single candidate.

(*b.*) A single cross opposite the name of each of several candidates.

(*c.*) Several crosses opposite the name of each of several candidates.

(*d.*) Crosses and figures opposite the name of several candidates.

(*e.*) A single stroke opposite the name of each of several candidates.

(*f.*) Eleven single strokes opposite the name of a single candidate.

(*g.*) Two strokes opposite the name of each of several candidates.

(*h.*) Several strokes opposite the name of each of several candidates.

I have retained some of the original ballot papers marked as above described, which will be produced to the Court on the hearing of the case if so required.

13. The returning officer had counted the single cross as described above under class (*a.*) as eleven votes for the candidate opposite whose name it was placed. It did not appear how he had counted the ballot papers marked as in the remaining classes (*b.*) to (*h.*) inclusive.

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The questions for the consideration of the High Court are:—

I. Whether all or any, and which, of the ballot papers marked as described in the above classes (*a.*) to (*h.*) respectively are valid? and, if valid,

II. Whether a single cross placed opposite the name of a single candidate is to be counted as representing one or eleven votes?

III. Whether when there are more crosses than one opposite the name of a candidate they are to be counted as representing a number of votes equal to the number of crosses?

IV. Where a ballot paper is marked with crosses and a figure combined, e.g. × 2 ×, how is it to be counted?

V. In ballot papers marked as described in (*e.*), (*f.*), (*g.*) and (*h.*), what number of votes are to be deemed to be represented by each of such marks on each of such papers respectively?

VI. Is a single stroke to be counted as representing a single vote?

VII. Are two strokes to be counted as representing two or eleven votes?

VIII. When there are more than two strokes opposite the name of a candidate, are they to be counted as representing a number of votes equal to the number of strokes?

Asquith, (*Brickwood* with him,) for the petitioners. The principle in *Woodward* v. *Sarsons* (1) applies to this case. The mere fact that ballot papers are marked with crosses or single strokes instead of numbers does not invalidate them. The order of the Education Department provides that the voter "may" place against the name of any candidate for whom he votes the number of votes he gives to such candidate in lieu of a cross. The voter is thereby given an option. In Sched. II. of the Ballot Act, 1872, the direction is that the voter "will" place a cross, &c., and the Court in *Woodward* v. *Sarsons* (1) held, with respect to elections to which that Act applies, that ballot papers marked otherwise than with a cross were valid. Where the voter unequivocally

(1) Law Rep. 10 C. P. 733.

indicates the number of votes he intends to give, and to whom he intends to give them, and it appears that he did not intend to give more votes than he had, the ballot paper is good. In order to render it invalid there must be some clear departure in principle from the provisions of the Act, or there must be a well-founded uncertainty as to the voter's intention. In the case mentioned in the second question for the opinion of the Court, where a single cross has been placed opposite the name of a single candidate, the true inference is that the voter intended to give one vote and not eleven votes to that candidate. There is no unequivocal evidence of an intention to exhaust the voting power. In many instances in the present case voters have not given all the votes they were entitled to give. That single cross should be counted as one vote, or the ballot paper should be rejected as being void for uncertainty.

The learned counsel then dealt in detail with the other cases of ballot papers irregularly marked set out in the case, and argued substantially in support of the views expressed in the judgments of the Court (post).

The respondent appeared in person, but did not argue.

LORD COLERIDGE, C.J. In this case the Court is invited to lay down a general rule whereby the General Order and the rules therein, made under the Elementary Education Acts by the Education Department with respect to elections of school boards, may be construed consistently with the provisions of the Ballot Act, 1872. Difficulties have arisen with respect to the voting papers at the election in question, and the commissioner has stated those difficulties in the case submitted for our opinion. During the argument I was at first disposed to think that all the voting papers marked with crosses must be rejected as being contrary to the provisions of clause (*b.*) of the General Order made by the Education Department, and set out in par. 8 of the case. But I think that *Woodward* v. *Sarsons* (1) is practically conclusive to the contrary. The authority of that case is binding upon me even if I did not agree with the decision. I do agree with that decision. I was not a party to it, and I am able on that account

(1) Law Rep. 10 C. P. 733.

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to adopt and follow with the greater respect the written judgment of the present Master of the Rolls and the other two learned judges. It is sufficient in the present case to consider whether a principle different to that applied in *Woodward* v. *Sarsons* (1) in respect of the effect of the regulations contained in the schedules to the Ballot Act, 1872, ought to be applied here in respect of the regulations made by the order of the Education Department. Now it is plain enough that where the object of a statute is clear, and it contains an absolute and mandatory enactment, the terms of that enactment must be strictly followed. But in *Woodward* v. *Sarsons* (1) the Court held that a different principle applied to the schedules of the Ballot Act, which contain rules and regulations for carrying out the object of the enactments in the body of the Act. It was considered that those regulations were directory only; that it was sufficient if they were obeyed substantially, and that, if the object to be attained under the statute and the regulations was sufficiently attained by the form which had in fact been used by the voter, the voting paper was valid. Now the Education Acts enact in terms that in elections of school boards the votes shall be cumulative; that each voter shall have as many votes as there are members to be elected; that the voter may exhaust his whole voting power, and may give all his votes to one candidate, or distribute them as he thinks fit amongst all or any of the candidates, always provided that he does not give more votes than he is entitled to give. The difficulty is thus introduced of bringing those regulations into harmony with the regulations for voting in parliamentary and municipal elections under the Ballot Act, where the votes are not cumulative, and a man has but one, or at most two, votes however many candidates there may be. The Ballot Act provides that a voter shall put a cross opposite the name of the candidate for whom he votes. The Education Department have felt the difficulty of dealing with cases of elections of school boards, where there are a great many more candidates, and consequently a great many more votes to be given by each voter. They have followed the regulations in the Ballot Act to a certain extent, and have provided by their general order that "the voter may place against the name of any candidate for

(1) Law Rep. 10 C. P. 733.

whom he votes the number of votes he gives to such candidate in lieu of a cross, and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly." The duty of altering the directions is thus left to the returning officer, and in the present case the directions to voters issued by him follow the provisions of the order.

I am of opinion that the principle of *Woodward* v. *Sarsons* (1) should be applied here. I think that if the voter indicates with reasonable clearness for which candidates he intends to vote, and how many votes he intends to give to each of them, the enactments of the Ballot Act, 1872, have been satisfied, and the directions of the order made by the Education Department may be construed in the same spirit as that in which the Court of Common Pleas construed the schedules to the Ballot Act, 1872, in *Woodward* v. *Sarsons*. (1) Taking that as the guiding principle, it remains to consider the questions presented to us in this case. I will deal with the case put in the second question last, as we are not entirely agreed with respect to it. As to the case put in par. 12 (*b.*), I think that a single cross opposite the name of each of several candidates indicates that the voter intended to give one vote for each candidate opposite whose name the cross is put. In other words, I think that each cross means a vote. As to the third question, where there are more crosses than one opposite the name of a candidate, I think that each cross should be counted as a vote for the candidate opposite whose name it is put. It follows, from the principles I have stated, that when you can clearly ascertain that the voter's intention was not to exhaust all his votes, effect should be given to that intention, so that, if the voter has put less than eleven crosses on the voting paper, they would count as so many votes as there are crosses. If he has put eleven crosses they would count as eleven votes. If he has put more than eleven crosses the voting paper would, of course, be invalid, both within the principle of *Woodward* v. *Sarsons* (1), and under the provisions of the Ballot Act. As to the fourth question, namely, how are the votes to be counted when the ballot paper is marked with crosses and a figure combined:—In one instance which was brought before us a single cross had been

(1) Law Rep. 10 C. P. 733.

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placed opposite the names of five of the candidates, and figures had been placed opposite each of those names, which figures, added up, exhausted the whole number of the votes which the voter was entitled to give. In that case I think it is clear that the voter meant the cross to indicate that he voted for the person against whose name it was put, and that he meant the figures to indicate the number of votes he gave for each candidate. The cross was meant to indicate the fact of voting, and the figure to shew to what extent he exercised his voting power. In another instance the figure 2 was placed between two crosses opposite the name of one candidate, and opposite the names of others were placed crosses, which, with those two, amounted to eleven. In that case I think it is clear that the figure must be rejected, and the votes counted by the crosses. As to the fifth, sixth, and eighth questions, where a single stroke has been placed opposite the names of several candidates, I think the voter meant to give one vote for each candidate. Where eleven single strokes are placed opposite the name of one candidate, I think the voter meant to give his eleven votes to that candidate. Where two strokes are placed opposite the name of each of several candidates, or several strokes opposite the name of each of several candidates, the same view would apply; each stroke should be counted as one vote. If the number of strokes on any voting paper exceeds eleven the paper is of course bad. As to the seventh question, where two strokes are placed opposite the name of one candidate only, I think that indicates that the voter meant to give all his eleven votes to that candidate, that is, that he meant the two strokes to signify the figure 11, and not to represent two votes only. As to the first case mentioned (in par. 12 of the case and in the second question), where a single cross has been placed opposite the name of one candidate only, there are three possible views with respect to that paper. It may be said that the voter, knowing that he might cumulate his votes, and desiring to do so, meant to plump for that candidate; or it may be said that this interpretation of his intention would be breaking into the principle that a single cross indicates a single vote, and therefore that the voter ought to be taken to have meant to give one vote only to the candidate, leaving his other ten votes undisposed of;

or it may be said that, the putting a single cross opposite the name of one candidate being as consistent with the one of these views as with the other, the commissioner ought to reject the voting paper as void for uncertainty. My own opinion is that the first view is the correct one. It seems to me exceedingly unlikely that a man who takes the trouble to vote at all should not vote up to the full extent of his voting power. I do not think that is the right inference to draw, and I should, therefore, myself arrive at the conclusion that the voter intended to give all his eleven votes to the one candidate opposite whose name he had put the cross. At the same time that view is not so clear to my Brother Denman as it is to me, and no doubt either the second or the third of the views I have mentioned might not unreasonably be adopted by the commissioner. I think the question whether the single cross means one thing or another is a question not of law but of fact, which the commissioner is the proper authority to determine. We must leave it to him to say whether in his opinion the single cross meant one vote or eleven votes, and if he has a real doubt upon the matter, he must act upon it, and reject the voting paper as void for uncertainty. It is clear that the voter meant to vote in one way or the other, and I think the commissioner would be wrong in rejecting the voting paper unless he is left in complete uncertainty as to which way the voter did intend to vote.

DENMAN, J. (after concurring with the judgment of Lord Coleridge, C.J., on all the other questions). With respect to the second question asked in this case, I think it is clear that the voter cannot be held to have intended to give ten votes to the single candidate opposite whose name he had placed a single cross—, that is, I think that he intended to make a cross and not the numeral X. The real question is whether he should be taken to have intended to give one vote or eleven votes. We have held in other instances that a single cross put opposite the names of more than one candidate, means a single vote given to each candidate. The Lord Chief Justice thinks that when the cross is put opposite the name of one candidate only, the right conclusion is that the voter intended to give all his votes to that

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candidate. I do not say that it is not a rational conclusion, but on the other hand I must confess I think that the single cross put opposite the name of a single candidate indicates an intention to give one vote only. I agree that the question is not wholly one of law. It is no doubt better not to turn into a point of law a question like this, which can be better dealt with at the place by the commissioner with his experience and knowledge of the habits and ways of the class of persons who vote at these elections. I agree that it is a question for him to determine, taking into account all the modes and habits of voting adopted at the place. If he comes to the conclusion that it is reasonably certain that the voter meant to give eleven votes to the candidate, he must act on that conclusion. If he thinks the voter only intended to give one vote, he must count the cross as one vote. If he is quite in the dark how many votes were intended to be given, he must reject the voting paper for uncertainty, even though it is clear that there was an intention to vote in one way or the other.

Judgment accordingly.

Solicitors for petitioner: *Burton, Yeates, Hart, & Burton, for William Morgan, Birmingham.*

W. A.

THE GUARDIANS OF THE POOR OF MAIDSTONE UNION, APPELLANTS; THE GUARDIANS OF THE POOR OF HOLBORN UNION, RESPONDENTS.

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April 13, 14.

Poor Law—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35—*Widow—Derivative Settlement.*

Upon appeal against an order for the removal of a widow it appeared that her husband was at the time of his death settled in a parish in the appellant union, and that she had acquired no settlement since his death:—

Held, that the term "wife" in 39 & 40 Vict. c. 61, s. 35, did not include a widow; that the pauper did not therefore take the settlement of her deceased husband, and that the order for her removal must be quashed.

UPON appeal to the Middlesex sessions against an order for the removal of Mary Ann Assiter, a pauper, from the Holborn Union to the Maidstone Union, the sessions confirmed the order, subject to a case.

Mary Ann Assiter, the pauper, was born in the parish of St. George, Bloomsbury, in the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, Middlesex, and is the widow of one Henry Assiter, to whom she was married at St. George's Church, Bloomsbury, on or about the 1st of May, 1858.

Henry Assiter died in the parish of Maidstone, in the appellant union, on the 11th of July, 1882, having gained a legal settlement in the parish of Maidstone by three years' residence, and by renting a tenement, which settlement Henry Assiter retained at the time of his death.

The pauper never acquired any settlement by any act of her own.

The order of removal was obtained upon the ground that the pauper, never having acquired a settlement in her own right, took the settlement which her deceased husband had gained and still retained at the time of his death in the appellant union.

It was contended on the part of the appellant union that the words "no person" contained in the first part of the 35th section of the Act of 39 & 40 Vict. c. 61 (which abolishes derivative settlements in all cases except in that of a wife from her husband and in that of a child under the age of sixteen) are by the

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context limited to persons whose settlement is under consideration, and that therefore the word "wife" in that section mentioned must be taken to refer only to a person who is a wife at the time of the settlement of such person being inquired into; and that therefore, as Mary Ann Assiter was at the time of her settlement being inquired into a widow, she could not be deemed to have derived a settlement from her deceased husband within the true meaning of that section; but that she must be deemed to be settled in the parish in which she was born.

It was contended on behalf of the respondent union that, inasmuch as the pauper's husband had at the time of his death gained a settlement in the parish of Maidstone, the pauper took the settlement so gained, and would retain the same after her husband's death until she acquired another settlement in her own right; and that therefore the place of her last settlement was the parish of Maidstone.

The court of quarter sessions, being of opinion that the contention of the respondent union was right, confirmed the order for the removal of the pauper to the appellant union.

The question for the opinion of the Court was whether or not the order of sessions was right.

Dickens, for the appellants. The question arises upon s. 35 of the Divided Parishes Act, 39 & 40 Vict. c. 61. (1) The pauper is clearly within the first branch of that section. The "person" there referred to is the individual whose settlement is the matter under inquiry. The principles laid down in *Reg.* v. *Bridg-*

(1) "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen,—which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

north (1) and *Reg.* v. *Edmonton* (2) in reality dispose of this case, though the question for decision turned upon another part of the section.

Jelf, Q.C., for the respondents. The meaning of s. 35, apart from the cases,—none of which throw much light upon this question,—is, that the widow is to take the settlement which her husband had at the time of his death. Derivative settlements are abolished, except in the case of a "wife" (which may be read "widow") and a child under the age of sixteen. The section cannot have meant that the widow should be taken away from the place where she had a right to be during the whole of her married life.

In *Headington Union* v. *St. Olave's Union* (3) the father of the children had died without having acquired any settlement of his own. Inasmuch as his was only a derivative settlement, and no evidence of such settlement was admissible in the case of the removal of his widow or children, and there was nothing to shew that the widowed mother had any settlement of her own, the children necessarily went to the parish in which they were born.

The case of a widow,—which is the present case,—is still res integra. A wife, even after her husband's death, remains a wife until she marries again.

MATHEW, J. It appears to me that there is no reasonable doubt as to the true construction of the statute in question. The meaning of this 35th section of 39 & 40 Vict. c. 61, has been a matter of much doubt: but that doubt has in a great measure been removed by the decisions of the present Master of the Rolls, particularly in *Reg.* v. *Bridgnorth* (4) and *Reg.* v. *Edmonton.* (5) The question is whether this woman acquired a settlement in the parish of Maidstone, which was the parish in which her husband had gained a settlement, or retained that which she formerly had in the parish where she was born; and that question depends upon the construction which is to be put upon the section referred to, which runs thus: "No person shall be deemed to have derived a settlement from any other person,

(1) 9 Q. B. D. 765; 11 Q. B. D. 314.
(2) 15 Q. B. D. 95, 339.
(3) 13 Q. B. D. 293.
(4) 11 Q. B. D. 314.
(5) 15 Q. B. D. 339.

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whether by parentage, estate, or otherwise, except in the case of a wife from her husband." The latter part of the section applies to a different class of persons; and it is that part which has given rise to difficulty in ascertaining the meaning of the legislature. But, confining our attention to that part which alone applies to this case, it appears to me to be clear that what was meant was what is said, viz., that no person except a wife shall be deemed to have derived a settlement from any other person. It is said that to give effect to the enactment we ought to construe "wife" to mean "widow." But, why are we to adopt this construction? The legislature has not provided for any such interpretation, and, if we may conjecture what the object of the Act was, it seems to me that we can see an excellent reason why the interpretation contended for should not be adopted. The main object of the Act appears to have been to prevent expensive inquiries into derivative settlements,—inquiries which would become all the more difficult and all the more expensive the further back the investigation had to go: and there is good reason for holding that the inquiry should be confined to the case of a settlement derived by a wife from her husband, because as a general rule that inquiry would be easily made and would involve no expense. But, the moment you come to the case of a widow, you have to inquire into the settlement of a man who may have been dead many years, and thus you let in the mischief the Act would seem to be intended to avoid. I have no doubt that this section ought to be interpreted in favour of the appellants in this case: and this, as I have already intimated, appears to me to be entirely in accordance with what was laid down by the Master of the Rolls in the cases above adverted to. I entirely accept the analogy suggested by him in the *Bridgnorth Case* (1) while construing another part of the 35th section.

A. L. SMITH, J. The question in this case is whether the pauper has a settlement derived from her husband as having been his wife, or is relegated to her birth-settlement; and that question turns upon the much debated 35th section of 39 & 40 Vict. c. 61. It is pretty clear from the authorities that the words "no person" in that section refer to the person whose settlement is

(1) 11 Q. B. D. at p. 320.

the subject of inquiry. Before reading the words of s. 35, I would refer to s. 34, which gives a new settlement by three years' continuous residence. Then s. 35 provides: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." If it had stopped there, the enactment would have abolished derivative settlements altogether, but it goes on, "except in the case of a wife from her husband and" (I will here read in) "except in the case of a child under the age of sixteen." It has already been decided that the second exception, as to a child under the age of sixteen, was put in to prevent children of tender age being separated from their parents,—from the father, if alive, and, as it seems to me, if he is dead, from the mother. Now, what is the reason for putting in the exception, "in the case of a wife from her husband?" Mr. Jelf seeks to read the exception thus,—"except in the case of a *widow* from her husband." It is worthy of remark that, a little later on in this very section, when the legislature are dealing with a widow they use the term "widow." The word "wife" in my judgment must be taken to mean an existing wife, and not a widow; that is, a person who fills the character of wife at the time when the question arises as to the settlement. I have considered the *Bridgnorth Case* (1) and the *Edmonton Case* (2), and in my judgment they substantially cover this case. The pauper, not being a "wife" at the time when the matter came on for adjudication, but a "widow," did not acquire a settlement from her husband by marriage, but goes back to her birth settlement. There must be judgment for the appellants, and the order of removal and the order of sessions must be quashed.

Judgment for the appellants.

Solicitors for appellants: *Kingsford, Dorman, & Co., for Beale, Hoar, Howlett, & Tatham, Maidstone.*

Solicitor for respondents: *John Rexworthy.*

(1) 9 Q. B. D. 765; 11 Q. B. D. 314. (2) 15 Q. B. D. 95, 339.

J. S.

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2. —— *Bankruptcy Notice—"Creditor who has obtained a final judgment"—Assignee of Judgment Debt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] In the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*)—which enables a creditor who has obtained a final judgment against a debtor to issue a bankruptcy notice requiring him to pay or secure the debt—the words "creditor who has obtained a final judgment" do not include an assignee of the judgment debt.—*Ex parte Woodall* (13 Q. B. D. 479) explained. EX PARTE BLANCHETT. IN RE KEELING - - - - C. A. 303

3. —— *Bankruptcy Notice—"Final Judgment"—"Balance Order" against contributory in winding-up of a Company—Bankruptcy Act*, 1883 (46, & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g.*)] A "balance order" in respect of calls made on a contributory in the winding-up of a company is not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued in respect of such an order.—*Ex parte Whinney* (13 Q. B. D. 476) followed. EX PARTE GRIMWADE. IN RE TENNENT - - C. A. 357

4. —— *Bankruptcy Notice—Final Judgment against Partnership Firm—Partner against whom Execution cannot issue without Leave of Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *subs.* 1 (*g*)—*Rules of Supreme Court*, 1883, *Order IX.*, *r.* 6; *Order XLII.*, *r.* 10.] Where a creditor has obtained judgment against a firm, but has not obtained the requisite leave under Order XLII., r. 10, to issue execution against a person alleged to be a member of the firm, he cannot serve such person with a notice under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*), which enables a creditor who has obtained final judgment against a debtor, "execution thereon not having been stayed," to issue a notice requiring the debtor to pay or secure the debt. EX PARTE IDE. IN RE IDE - - - C. A. 755

5. —— *Execution Creditor—Garnishee Order—Completion of Attachment—"Receipt of Debt," what is—Money paid into court to abide further Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.] A creditor having obtained a garnishee order in respect of a debt due to the judgment debtor, a third person intervened claiming that the debt was due to her; and the garnishee, under an order of the Court, paid the amount into court to abide further order. A receiving order having been subsequently made against the judgment debtor, the third person withdrew her claim:—*Held*, that there had been no "receipt of the debt," by the creditor within the meaning of s. 45 of the Bankruptcy Act, 1883, so as to entitle him

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to retain it against the judgment debtor's trustee in bankruptcy. BUTLER *v.* WEARING - 182

6. —— *Judgment creditor—Order for Committal—Receiving Order in lieu of Committal—Damages payable by Co-respondent in Divorce Suit—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 5—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Divorce Court Act* (20 & 21 *Vict. c.* 85), *ss.* 33, 52.] By s. 103, sub-s. 5, of the Bankruptcy Act, 1883, "where, under s. 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor . . . make a receiving order against the debtor," *Held*, that a receiving order cannot be made on the application of every person who is entitled to apply to the Court under s. 5 of the Debtors Act, but only on the application of a person who is strictly speaking a "judgment creditor."—In a suit for divorce by a husband the jury gave a verdict in his favour, with 1000*l.* damages against the co-respondent, and the judge ordered him to pay the 1000*l.* into court. A subsequent order was made, directing that the co-respondent should pay the 1000*l.* to the husband forthwith, for the purpose of settlement upon the children of the marriage.—*Held*, that under this order the husband was not, within the meaning of sub-s. 5 of s. 103, a "judgment creditor" of the co-respondent, and that, on the co-respondent's default in paying the money, the Court had no jurisdiction to make a receiving order against him in lieu of committing him.—Decision of Cave, J., reversed.—A judgment debtor makes default in the paying the judgment debt, and the Court has power to commit him under s. 5 of the Debtors Act, if he has had the means of paying any part of it, though he has not had the means of paying the whole. EX PARTE FRYER. IN RE FRYER - - - - C. A. 718

7. —— *Deed of Composition—Construction—Inconsistency between Recitals and operative Part—Settlement—Life Estate—Forfeiture in Event of Bankruptcy or Alienation—Special Case stated by County Court sitting in Bankruptcy for Opinion of High Court—Right of Appeal from Decision of High Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 97 (*sub-s.* 3), *s.* 104, *sub-s.* 2 (*a*), (*b*)—*Bankruptcy Appeals* (*County Courts*) *Act*, 1884 (47 & 48 *Vict. c.* 9), *s.* 2.] A deed of composition executed by a debtor who had filed a bankruptcy petition recited that the debtor was possessed of or entitled to the real and personal estate specified in a schedule to the deed, and that in accordance with his desire to pay his creditors 20*s.* in the pound, and in order that the composition should be secured, he had agreed with the trustee to assign to him all the property set forth in the schedule, upon the trusts thereinafter contained. By the operative part the debtor, "for effectuating the said desire, and in pursuance of the said agreement," assigned to the trustee "all and singular the several properties, chattels, and effects set forth in the said schedule hereto, and all the estate, right, title, interest, claim, and demand," of the debtor "in, to, and upon the said chattels,

properties, and effects, *and all other the estate (if any)*" of the debtor.—The debtor was, under the trusts of a post-nuptial settlement, entitled to a life interest in certain property. This life interest was not mentioned in the schedule:—*Held*, that the general words of the assignment were controlled by the recital, which shewed that the deed was intended to apply only to the property specified in the schedule, and that the life interest did not pass to the trustee.—The life interest was subject to a proviso that if the debtor should assign, charge, or otherwise dispose of the income, or should become bankrupt, "or do or suffer anything whereby the income, if payable to him absolutely, would become vested in any other person," then the trust declared in his favour should cease, and during the remainder of his life the trustees might apply the income for the benefit of his wife and children:—*Held*, by Cave, J., that neither the filing of the bankruptcy petition nor the execution of the composition deed worked a forfeiture of the debtor's life interest.—*In re Amherst's Trusts* (Law Rep. 13 Eq. 464) distinguished.—An appeal lies to the Court of Appeal from the decision of the High Court upon a special case for its opinion stated by a county court sitting in bankruptcy under sub-s. 3 of s. 97 of the Bankruptcy Act, 1883. EX PARTE DAWES. IN RE MOON - - - C. A. 275

8. —— *Married Woman—Separate Property—Settlement—General Power of Appointment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 24—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5, *s.* 19.] Real property was by a marriage settlement vested in a trustee in trust for the married woman for life for her separate use without restriction on anticipation, with remainder to such persons for such estates as she might, whether covert or sole, by deed or will appoint, and in default of appointment to her children in fee. The settlement also contained a provision under which the property could be sold or mortgaged by her direction, and the proceeds paid to her:—*Held*, that she was subject to the provisions of the bankruptcy laws in respect of such property as being her separate property, under s. 1, sub-s. 5, of the Married Women's Property Act, 1882, and should therefore be directed to exercise the power of appointment in favour of the trustee in bankruptcy of her estate under s. 24 of the Bankruptcy Act, 1883. IN RE ARMSTRONG. EX PARTE GILCHRIST - - - - 167

9. —— *Married Woman trading separately from her Husband—Separate Property—General Power of Appointment—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 152—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 4, 15.] By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 5, "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole":—*Held*, that the expression "separate property" includes only that which would, if the woman was unmarried, be her "property," and does not therefore include a general power of

appointment by deed or will of which she is the donee, but which she has not exercised, and a married woman who has traded separately from her husband and who has been adjudicated a bankrupt, cannot be compelled to execute a deed exercising such a power in favour of the trustee in the bankruptcy.—Decision of Divisional Court (17 Q. B. D. 167) reversed. EX PARTE GILCHRIST. IN RE ARMSTRONG - - - C. A. 521

10. —— *Invalid Settlement — Majority of Creditors opposed to Litigation—Proceedings by Minority of Creditors to set aside Settlement—Motion—Viva voce Evidence—Practice.*] When a minority of the creditors of a bankrupt are dissatisfied with the refusal of the trustee to take proceedings to recover property alleged to be part of the bankrupt's estate, and desire to institute such proceedings themselves, they must, in the first instance, apply to the trustee for leave to use his name, and offer him a proper indemnity. If he refuses, they are entitled to apply to the Court for leave to use the name of the trustee on giving him an indemnity against costs.—Viva voce evidence in support of a motion may be given at the hearing; but special leave for that purpose must be previously obtained. EX PARTE KEARSLEY. IN RE GENESE - - - 1

11. —— *Fraudulent Conveyance*—13 *Eliz. c.* 5—*Intent to delay, hinder, or defraud Creditors—Pending Action for Breach of Promise of Marriage—Voluntary Settlement for Benefit of Wife and Children—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.] A master mariner was married at Hong Kong on May 31, 1881. In the following August, an action for breach of promise of marriage was commenced against him, and the writ served upon him at Hong Kong on October 8. At the time of his marriage he was entitled to a legacy of 500*l.*, which had become vested in possession on the death of his mother (who had a life interest in it) on May 11, 1881. On October 17, 1881, being still at Hong Kong, he made a voluntary settlement of the legacy upon trust during the joint lives of himself and his wife for her separate use, remainder for the survivor for life, remainder for the children of the marriage, remainder, in default of children, for himself absolutely. Judgment was obtained against him in the action on July 20, 1882, for 500*l.*, and in November, 1884, he was adjudicated bankrupt. It appeared that when he executed the settlement he was able to pay his debts without the aid of the property comprised in the settlement, and that he did not know that he was entitled to the legacy until a few days before he executed the settlement, and he stated that in executing it he was not influenced by the action which had been commenced against him:—*Held*, that there was not sufficient evidence to warrant a judge or jury in finding that the settlement was intended to "delay, hinder, or defraud creditors" within 13 Eliz. c. 5.—*Freeman* v. *Pope* (Law Rep. 5 Ch. 538) considered. EX PARTE MERCER. IN RE WISE - - - - C. A. 290

12. —— *Secured Creditor — Amendment of Valuation of Security—Time—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., rr.* 12, 13.] By the Bankruptcy Act, 1883, Sched. II., r. 12 (*a*),

where a security is valued by a creditor in his proof the trustee may at any time redeem it on payment to the creditor of the assessed value. By r. 13 a creditor who has valued his security may "at any time" amend the valuation and proof on shewing "to the satisfaction of the trustee, or the Court, that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation."—A secured creditor having stated in his proof the value at which he assessed his security, the trustee gave him written notice that "it was his intention" to redeem the security so valued, and thereupon applied for and received from the Board of Trade the amount required for such redemption. Before any further step was taken the creditor applied to amend his proof and valuation, the security having increased in value:—*Held*, reversing the judgment of Cave, J., that nothing had occurred to prevent the amendment from being allowed.—*Semble*, that, upon the true construction of rr. 12, 13, the amendment could not be allowed after the trustee in the exercise of his right of redemption had paid the assessed value of the security to the creditor; and, that it could not be allowed after the trustee had, under r. 12 (*c*), elected to redeem the security at the assessed value. EX PARTE NORRIS. IN RE SADLER - - - - - C. A. 728

13. —— *Computation of Time—Priority of Debts—Wages or Salary—"Four months before date of receiving Order"—Interim Receiving Order—Official Receiver's Accounts—Objection by Trustee—Practice—Bankruptcy Act*, 1883, *ss.* 40, 70 (*sub-s.* 3), 101—*Bankruptcy Rules*, 1883, *r.* 249.] In the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40, sub-s. (*b*),—which directs that the wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding 50*l.*, shall be paid in priority to all other debts,—the four months are those "next" before the date of the receiving order; and where an interim receiver has been appointed, the four months are to be computed from the date of the order appointing the interim receiver.—When the trustee in bankruptcy is dissatisfied with the accounts rendered to him by the official receiver he should make a report thereon to the Board of Trade pursuant to the 249th rule of the Bankruptcy Rules, 1883; and if the Board neglect or refuse to act in the matter, he should then apply to the Court for directions under s. 101 of the Act. EX PARTE FOX. IN RE SMITH - 4

14. —— *Trustee in Bankruptcy—Unreasonable Rejection of Proof—Directions of Committee of Inspection—Costs—Judgment entered under Judge's Order by Consent in Personal Action—Omission to file Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 89—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 27.] The Court in reversing the decision of the trustee in a bankruptcy rejecting a proof, ordered him to pay the costs personally, being of opinion that he had acted unreasonably and improperly in rejecting it.—A trustee in bankruptcy rejected a proof tendered in respect of a debt for which judgment had been

entered against the bankrupt in the Queen's Bench Division under a judge's order by consent, on the ground that the order had not been filed as required by s. 27 of the Debtors Act (32 & 33 Vict. c. 62), so that the judgment was void.—The trustee in rejecting the proof acted under the directions of the committee of inspection:—*Held* by the Court of Appeal, affirming the judgment of Cave, J., that there was no ground for contending that the invalidity of the judgment affected the right of the plaintiff to prove for the debt for which the action was brought; that the decision of the trustee must be reversed with costs, to be paid by him personally; and that the fact that he had acted under the directions of the committee of inspection did not affect his liability. EX PARTE BROWN. IN RE SMITH - C. A. 488

15. —— *Refusal of Registrar of County Court to carry out Order of Court of Appeal—Procedure to compel Obedience—Jurisdiction.*] Upon appeal from a county court in a bankruptcy proceeding, the Divisional Court allowed the appeal, and ordered money which had been paid into the county court to abide the result of the appeal, to be paid out to the appellant. The Divisional Court also gave leave to appeal to the Court of Appeal, but made no order for a stay of proceedings. The registrar of the county court having refused to pay out the money until the time for appealing to the Court of Appeal had elapsed:—*Held*, that the refusal was unjustifiable, but that the registrar being an officer of the county court, the Divisional Court had no jurisdiction over him personally to enforce compliance with the order. EX PARTE REGISTRAR OF CROYDON COUNTY COURT. IN RE WISE - - - - - C. A. 389

16. —— *Scheme of Arrangement—Discovery of Debtor's Property—Power to summon Witnesses for Examination—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 27, 168.] The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27—which enables the Court on the application of the trustee to summon before it for examination the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, &c.—does not apply to the trustee under a composition or scheme of arrangement which has been duly approved by the Court under s. 18 of the Act. EX PARTE WHINNEY. IN RE GRANT C. A. [238

17. —— *Scheme of Arrangement—Approval of Court—Wishes of Creditors—Duty of Trader as to keeping Accounts—Official Receiver—Appearance on Appeal—Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28.] In determining whether to approve a scheme of arrangement of the affairs of a debtor, which had been accepted by his creditors under the provisions of s. 18 of the Bankruptcy Act, 1883, the Court must form its own judgment whether the terms of the scheme are reasonable or calculated to benefit the general body of creditors, and must not be influenced by the wishes of the majority of the creditors.—If the registrar has refused to approve of such a scheme,

BANKRUPTCY—*continued.*

the Court of Appeal will not reverse his decision unless it is satisfied that he has exercised his discretion wrongly.—In order that a trader may fulfil the requirements of sub-s. 3 (*a*) of s. 28 of the Act, his books must be kept in such a way as to shew at once, without the necessity of a prolonged investigation by a skilled accountant, the state of his business.—As a general rule, and in the absence of special circumstances, the official receiver ought not to appear upon the hearing of an appeal, unless he is required to do so by the Court, and, if he appears unnecessarily, he will not be allowed any costs. He is not justified in appearing merely to defend his report. EX PARTE REED. IN RE REED [C.A. 244

—— Bill of sale—Validity—Deviation from statutory form—Assignment "as beneficial owner" - - - - 259
See BILL OF SALE. 3.

—— Indemnity against covenant to leave premises in repair—Bankruptcy of surety during term—"Liability present or future, certain or contingent" - 770
See LANDLORD AND TENANT. 2.

BAR—Trial at bar—Action against Board of Trade—Interest of Crown—Change of venue - - - - 658
See CROWN, PREROGATIVE OF.

BASTARDY—*Practice—Appeal—Form of Notice of*—7 & 8 *Vict. c.* 101, *s.* 4—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 2—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *ss.* 4, 6.] An appeal to sessions against an order made on a bastardy summons can, since the passing of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), only be brought subject to the conditions and regulations contained in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). The notice of appeal must therefore state the general grounds of appeal as required by s. 31, sub-s. 2 of that Act. THE QUEEN *v.* SHINGLER - - - - - - - 49

BILL OF LADING—Exceptions—"Dangers and accidents of the seas"—Damage caused by rats - - - - 670
See SHIP.

—— How far controlling charterparty—Exception of liability for act, neglect, or default of master - - - - 316
See SHIP. 2.

BILL OF SALE—*After-acquired Property, Assignment of—Future Book Debts.*] A bill of sale contained an assignment of (among other things) all the book debts which might during the continuance of the security become due and owing to the mortgagor:—*Held*, that such an assignment of future book debts was valid, and operated to pass the beneficial interest in a debt which came into existence after the assignment. THE OFFICIAL RECEIVER *v.* TAILBY - - - - 88

2. —— *Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8—*Consideration, Statement of—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule—Bill of Sale given by way of Indemnity to a Surety.*] By a bill of sale expressed to be given in consideration of the grantee thereof having at the request of the

BILL OF SALE—*continued.*

grantor become guarantee, and signed a promissory note for the payment of a sum of 45*l.* by the grantor, of which 32*l.*, or thereabouts, was then owing, the grantor assigned to the grantee certain chattels, described in a schedule, by way of security for any moneys which the grantee might be called upon to pay in respect of such guarantee and interest thereon at the rate of 5*l.* per cent. per annum, and the grantor agreed that he would pay to the grantee any sums as aforesaid, together with interest then due, by monthly payments of 2*l.* on the first of every month. It being contended that the bill of sale was void on the ground that the consideration for which it was given was not sufficiently stated to satisfy the requirements of the 8th section of the Bills of Sale Act, 1878, and that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882:—*Held*, that the bill of sale was good. HUGHES *v.* LITTLE - 204

3. —— *Bill of Sale—Validity—Deviation from Statutory Form—Assignment of Chattels "as beneficial Owner"—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 2, 7.] A bill of sale of chattels, given by way of security for the payment of money, by which the grantor purports to assign the chattels "as beneficial owner," is not "in accordance" with the form given in the schedule to the Bills of Sale Act of 1882, and is therefore made void by s. 9 of that Act. Per Lord Esher, M.R., and Cotton, Lindley, Bowen, and Lopes, L.JJ. A bill of sale which deviates from the statutory form will not be made void by s. 9, if it produces the precise legal effect—neither more nor less—of that form, and if the variance is not calculated reasonably to deceive those for whose benefit the statutory form is provided. Per Fry, L.J. *Semble*, that a bill of sale which produces precisely the same legal effect as a document in the statutory form may still be void under s. 9, if, for instance, it contains prolix and useless recitals, and is generally framed with unnecessary prolixity. A bill of sale of chattels given as security for money contained stipulations by the grantor to insure the chattels against fire in the sum of 900*l.*, to pay the premiums, and, on demand, to produce the receipts for the premiums to the grantee; and that, if default should be made by the grantor in effecting or keeping up the policy, the grantee might insure the property, and that all moneys expended by him for that purpose, with interest thereon, should on demand be repaid by the grantor, and until repayment should be a charge on the property. But it was provided that the goods should not be liable to seizure by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882:—*Held* (by Lord Esher, M.R., and Lindley and Lopes, L.JJ.), that the deed was not, by reason of any of these stipulations, made void by s. 9 of the Act. EX PARTE STANFORD. IN RE BARBER - - - - C.A. 259

4. —— *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Form in Schedule, Deviation from—Covenant necessary for maintaining the Security.*] By a bill of sale given by way of security for the repayment of money,

BILL OF SALE—*continued.*

the mortgagor covenanted to repay the principal sum of 300*l.*, with interest thereon at the rate of 40 per cent. per annum, by equal quarterly payments of 180*l.* each, on certain dates specified, until the whole of the said principal money and interest was repaid, and it was provided that, if the mortgagor did not pay the rent, rates, taxes and outgoings of the premises on which the goods assigned might be within seven days after the same respectively became payable, the mortgagees might, if they thought fit, pay such rent, rates, taxes and outgoings, and all sums of money so paid by the mortgagees, with interest thereon at the same rate as aforesaid, should be charged on the goods assigned, and be recoverable in the same manner as the principal moneys and interest secured by the bill of sale:—*Held*, that such bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. BIANCHI *v.* OFFORD - - - - - 484

5. —— *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Recited Indenture—Agreement to perform Covenants of—Non-disclosure thereof.*] A bill of sale after reciting a certain indenture, contained, inter alia, an agreement by the grantor that he would "perform the covenants and stipulations contained in the said recited indenture;" but those covenants and stipulations did not appear in the bill of sale:—*Held*, that the bill of sale was therefore void under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9. LEE *v.* BARNES 77

6. —— *Deviation from Statutory Form—Extent of Avoidance—Covenant for Payment of Principal and Interest—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 8, 9.] Sect. 9 of the Bills of Sale Act, 1882, in avoiding a bill of sale which is not made in accordance with the form in the schedule to the Act, avoids it in toto—not merely as regards the personal chattels comprised in it—so that a covenant contained in it for the payment by the grantee of the principal and interest thereby secured is rendered void as against him. DAVIES *v.* REES - - - - - C. A. 408

7. —— *Power of Sale on Default—Provision excusing Purchaser from Inquiry as to Default—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule, Deviation from.*] A bill of sale which contains a provision that a purchaser on a sale after default in payment of an instalment due under the bill of sale, shall not be bound to inquire whether any such default has been made, is void, as substantially deviating from the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9. BLAIBERG *v.* PARSONS - - - - - 336

8. —— *Repayment by Instalments—Interest upon Interest — Postponement of Redemption—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).] By a bill of sale goods were assigned as security for repayment of 500*l.* and interest thereon at 60*l.* per cent., and the grantor agreed to pay "the principal sum aforesaid together with the interest then due by twelve equal monthly payments of 41*l.* 13*s.* 4*d.* until the whole of the said sum and interest should be fully paid," and that in default of payment of any instalment then that the grantor would pay interest thereon at the rate aforesaid from the date when such instalments should become due until full payment thereof. The grantor also agreed, inter alia, to insure the premises assigned and pay all premiums, and that upon default the grantee might do so and "charge the costs thereof with interest at the rate of 20*l.* per cent. per annum" to the grantor, and the same should be considered to be included in the security, and might pay all rent, rates, and taxes at any time due for the messuage in which the goods might be, and thereupon all such payments made by the grantee, together with interest at 20*l.* per cent. per annum, should be a charge on the chattels, which should not be redeemed until full payment of all such sums and interest:—*Held*, that on the true construction of the bill of sale, interest upon interest was reserved, and that it was at least uncertain whether redemption was not prevented until the expiration of the period over which the repayment by instalments would extend, and that the stipulations, being doubtful, and of an oppressive kind, were inconsistent with the form prescribed by the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. 4. 43), and rendered the bill of sale void. GOLDSTROM *v.* TALLERMANN - - - - - 80

9. —— *Validity of—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Covenant necessary for Maintenance of the Security.*] A bill of sale by which household furniture was assigned by way of security for the payment of money contained a covenant by the grantor that he would not permit the chattels so assigned, or any part thereof, to be destroyed or injured or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear, and that, whenever any of the said chattels should be destroyed, injured, or deteriorated, he would forthwith replace, repair, and make good the same. The bill of sale provided that upon default in the performance of any of the covenants therein contained on the part of the grantor, all of which covenants were thereby declared to be necessary for the maintenance of the security thereby created, the grantees should have power to seize the goods without notice immediately or whenever they might think fit:—*Held*, that the beforementioned covenant was not necessary for the maintenance of the security, and that the bill of sale was void by reason of the provisions of the Bills of Sale Act (1878) Amendment Act, 1882. FURBER *v.* COBB - - - - 459

10. —— *Validity—Description of Goods assigned—Omission to specify House or Place where Goods are situated—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 11.] Under the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), a bill of sale is not void for omitting to specify the house or place at which the goods assigned are situated. EX PARTE HILL. IN RE LANE - - - - - - 74

11. —— *Validity—Pledge of Goods—Delivery to Pledgee—Document containing Terms of Pledge—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31),

BILL OF SALE—*continued.*

ss. 3, 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9.] Where goods are pledged as security for a loan and delivered to the pledgee, a document signed by the pledgor, recording the transaction and regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale within the Bills of Sale Act, 1882, and is therefore not liable to be avoided under s. 9 for deviating from the prescribed form.—*Ex parte Parsons* (16 Q. B. D. 532) explained. EX PARTE HUBBARD. IN RE HARDWICK - C. A. 690

12. —— *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 13—*Seizure under Bill of Sale—Goods in Public Highway—Removal within five Days—Action for.*] By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13, chattels seized or taken possession of under a bill of sale "shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days."—A horse and carriage were seized, under a bill of sale, in a public street and at once removed to premises of the grantee, and after five days were sold by him:—*Held*, that the seizure in the street was lawful, and, in the absence of actual damage arising from the removal within the five days, no action would lie. O'NEIL *v.* CITY AND COUNTY FINANCE CO. - - 234

BOARD OF TRADE—Detention of ship for survey —Action—Right to trial at bar—Prerogative of Crown - - - 658
See CROWN.

BOILER WORKS—Rateability - - 651
See POOR-RATE.

BOOK DEBT—Assignment of future book debts— —Bill of sale - - - 88
See BILL OF SALE. 1.

BOOK KEEPING—Omission to keep proper books of account—Bankruptcy - - 244
See BANKRUPTCY. 17.

BOROUGH—Municipal—Election—Qualification of town councillor - - - 44
See MUNICIPAL ELECTION.

BRIDGE—*County, Liability of, to repair—Bridge not built in existing Highway—Acquiescence by County, necessary—County of a Town—Roadway over Bridge and Approaches—Highway Authority—Statute of Bridges* (22 *Hen.* 8, *c.* 5)—*Highway Act*, 1835 (5 & 6 *Wm.* 4, *c.* 50), *s.* 21.] The owners of land on one side of a river made a road across such land and built a bridge connecting such road with an existing highway on the other side of the river. They then dedicated both bridge and road simultaneously to the public, who afterwards used the same:—*Held*, that, the bridge not having been erected in an existing highway, the county was not liable for its repair, inasmuch as there was no evidence of acquiescence by the county in the building and dedication of the bridge.—The effect of the 21st section of the Highway Act, 1835, is, in the case of county bridges built subsequently to that Act, to throw the liability in respect of surface repairs to the roadway of the bridge and approaches upon the highway authority.—Where a county of a town has been created by charter and declared to

BRIDGE—*continued.*

be a separate county, the county in which it was originally situated is not liable for the repair of bridges within its boundaries. THE QUEEN *v.* INHABITANTS OF COUNTY OF SOUTHAMPTON 424

BUILDING SOCIETY—*Rules—Dispute—Arbitration—Mortgagor and Mortgagee—Building Societies Act*, 1884 (47 & 48 *Vict. c.* 41), *s.* 2.] By s. 2 of the Building Societies Act, 1884, the word "disputes" in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member in his capacity of member of the society, and shall not apply to any dispute between any such society and any member as to the construction or effect of any mortgage deed, and shall not prevent any society, or any member thereof, from obtaining in the ordinary course of law any remedy in respect of any such mortgage to which he or the society would otherwise be by law entitled. The rules of a building society provided that any dispute arising between the society and any member thereof should be referred to arbitration:—*Held*, that a dispute between the society and one of its members in their respective capacities of mortgagees and mortgagor, was a dispute between the society and a member in his capacity of member within the meaning of s. 2; that the words "any such mortgage" in the latter part of the section referred only to mortgages in respect of the construction or effect of which there was a dispute, and therefore that the member was entitled to have referred to arbitration a dispute as to whether or not he had paid moneys alleged to be due from him to the society under the mortgage deed. WESTERN SUBURBAN AND NOTTING HILL PERMANENT BENEFIT BUILDING SOCIETY *v.* MARTIN - - - 66

2. —— *Rules—Dispute—Arbitration — Mortgagor and Mortgagee — Building Societies Act*, 1884 (47 & 48 *Vict. c.* 41), *s.* 2.] By s. 2 of the Building Societies Act, 1884, unless otherwise expressly provided, the word "disputes" in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member in his capacity of member of the society, and shall not apply to any dispute between any such society and any member thereof as to the construction or effect of any mortgage deed, and shall not prevent any society, or any member thereof, from obtaining in the ordinary course of law any remedy in respect of any such mortgage, to which he or the society would otherwise be by law entitled.—The rules of a building society provided that any dispute arising between the society and any member thereof should be referred to arbitration:—*Held*, in an action by the society to recover money due from a member under a covenant in a mortgage deed, that the words "any such mortgage" in the latter part of the section referred to any mortgage between the society and one of its members, and not only to mortgages as to the construction or effect of which there was a dispute, and, therefore, whether the dispute was one between the society and a member, in his capacity of member of the society, or not, and whether it was a dispute as to the construction or effect of the mortgage deed or not,

BUILDING SOCIETY—*continued.*
the rule did not apply, and the plaintiffs were entitled to proceed with their action.—Judgment of Grove and Stephen, JJ., reversed. Western Suburban and Notting Hill Permanent Benefit Building Society *v.* Martin - **C. A. 609**

CARRIER — Railway — Passengers' luggage — Delivery to porter - - - **215**
See Railway.

CASE—County Court—Appeal to High Court—Special case - - - - **761**
See Practice. 6.

—— Special case—Appeal from Divisional Court to Court of Appeal—Railway commissioners - - - - **230**
See Railway Commissioners.

—— Special case stated, by County Court sitting in bankruptcy for opinion of High Court—Appeal to Court of Appeal - **275**
See Bankruptcy. 7.

—— Special case stated under Summary Jurisdiction Act, 1879—Appeal to Court of Appeal - - - - **344**
See Highway. 2.

CASES—*Amherst's Trusts, In re* (Law Rep. 13 Eq. 464) distinguished - - **275**
See Bankruptcy. 7.

—— *Bergheim* v. *South Eastern Ry. Co.* (3 C. P. D. 221) explained - - - **215**
See Railway.

—— *Calvin's Case* (Coke, Rep. part vii., p. 46, 27 B.) dissented from - - **54**
See Parliament. 3.

—— *Fitzherbert* v. *Mather* (1 T. R. 12) commented on - - - - **553**
See Insurance (Marine).

—— *Freeman* v. *Pope* (Law Rep. 5 Ch. 538) considered - - - - **290**
See Bankruptcy. 11.

—— *Gladstone* v. *King* (1 M. & S. 35) commented on - - - - **553**
See Insurance (Marine).

—— *Goodwin* v. *Robarts* (1 App. Cas. 476) followed - - - - **705**
See Trover.

—— *Hall* v. *Truman, Hanbury & Co.* (29 Ch. D. 307) followed - - - **101**
See Practice. 8.

—— *Jones* v. *Monte Video Gas Co.* (5 Q. B. D. 556) followed - - - **101**
See Practice. 8.

—— *Kent* v. *Worthing Local Board* (10 Q. B. D. 118) commented on - - **462**
See Waterworks.

—— *Laing* v. *Bishopwearmouth* (3 Q. B. D. 299) discussed and followed - - **651**
See Poor-rate.

—— *Lund* v. *Campbell* (14 Q. B. D. 821) distinguished - - - - **606**
See Practice. 3.

—— *Parsons, Ex parte* (16 Q. B. D. 532) explained - - - - **690**
See Bill of Sale. 11.

CASES—*continued.*
—— *Proudfoot* v. *Montefiore* (Law Rep. 2 Q. B. 511) commented on - - **553**
See Insurance (Marine).

—— *Reg.* v. *Pembliton* (Law Rep 2 C. C. 119) distinguished - - - **359**
See Criminal Law. 4.

—— *Ricket* v. *Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175) commented on - **12**
See Compensation.

—— *Solomon* v. *Bitton* (8 Q. B. D. 176) explained
See Practice. [736

—— *Stockport, Timperley, and Altringham Ry. Co., In re* (33 L. J. (Q. B.) 251) distinguished and commented on - **447**
See Compensation. 2.

—— *Waterhouse* v. *Gilbert* (15 Q. B. D. 569) applied - - - - **128**
See Practice. 10.

—— *Whinney, Ex parte* (13 Q. B. D. 476) followed - - - - **357**
See Bankruptcy. 3.

—— *Woodall, Ex parte* (13 Q. B. D. 479) explained - - - - **303**
See Bankruptcy. 2.

—— *Woodward* v. *Sarsons* (Law Rep. 10 C. P. 733) followed - - - **805**
See Elementary Education Acts.

CHARTERPARTY—Exceptions—"Damages and accidents of the seas"—Damage caused by rats - - - - **670**
See Ship.

—— Loss of goods—Liability of shipowner—Bill of lading—How far controlling charterparty - - - **316**
See Ship. 2.

CHOSE IN ACTION—Assignment abroad—Policy of life insurance—Conflict of laws **309**
See Conflict of Laws.

—— Assignment—Assence of consideration **442**
See Practice.

CLUB—Selling liquor without licence—Unauthorized sale by steward - - **132**
See Licensing Acts.

COMPANY — Contributory — Balance order — "Final judgment"—Bankruptcy **357**
See Bankruptcy. 3.

—— Domicile—Registered office in Scotland—Action for breach of contract—Service out of jurisdiction - - - **421**
See Practice. 17.

COMPENSATION—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Lands injuriously affected during the execution of the Works.*] Under the Lands and Railways Clauses Consolidation Acts the owner or occupier of lands injuriously affected during the execution of the works authorized by the special Act is entitled to compensation, if the injury is sufficient to lessen the value of the property.—Observations of Lord Chelmsford, L.C., in *Ricket* v. *Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175, at p. 194) commented on.—A house was divided into a front and a back block: and the plaintiffs were lessees of three rooms on the first floor in the

COMPENSATION—*continued.*
back block. The lease did not expressly grant any mode of access. Access to the rooms demised to the plaintiffs was gained from the street by passing through a hall or vestibule, and then up some stairs to the plaintiffs' rooms. The defendants, in the exercise of compulsory powers under the Railways Clauses Consolidation Act, took down the front block of the house, and removed the hall. The interference with the hall and the injury to the access to the rooms of which the plaintiffs were lessees, lessened their value. An arbitrator having awarded compensation to the plaintiffs under the Lands and Railways Clauses Consolidation Acts:—*Held*, that the award was valid on the grounds, first, that compensation may be obtained under the Railways Clauses Consolidation Act, 1845, for injury done to land by the execution of the works, if it is sufficient to lessen the value thereof: secondly, that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that an interference with this quasi easement was sufficient to give rise to a valid claim for compensation. FORD *v.* METROPOLITAN AND METROPOLITAN DISTRICT RAILWAY COMPANIES - - - - - C. A. 12

2. —— *Lands Clauses Act*, 1845 (8 & 9 *Vict.* c. 18), s. 63—*Part of Building Estate taken for Sewage Farm—Value of other Parts thereby depreciated—Compensation for "injuriously affecting" same.*] Part of land laid out as a building estate was taken by a local board under an Act incorporating the Lands Clauses Act (8 & 9 Vict. c. 18), for the purposes of a sewage farm, whereby the value of other parts of the land was depreciated; these other parts were situate near to the part so taken, but separated from it by intervening land belonging to other owners:—*Held* (reversing the judgment of the Queen's Bench Division), that the owner of the building estate was not entitled to compensation under the Lands Clauses Act, 1845, s. 63, for damage sustained by reason of "injuriously affecting" the parts of the land other than that which was taken by the exercise of the statutory powers.—*In re Stockport, Timperley, and Altringham Ry. Co.* (33 L. J. (Q. B.) 251) distinguished and commented on. THE QUEEN *v.* ESSEX - - - C. A. 447

COMPOSITION — Deed—Construction—Inconsistency between recitals and operative part
See BANKRUPTCY. 7. [275

CONCEALMENT—Marine insurance—Principal and agent—Brokers employed by assured, but not broker through whom policy was effected - - 553
See INSURANCE (MARINE).

CONFLICT OF LAWS—*Chose in Action, assignment of, abroad—Policy of Life Insurance—Husband and Wife—Domicil.*] The plaintiff sued the trustees of an English life insurance company as assignee of a policy of life insurance granted by such company. The assignment of the policy was made in Cape Colony, and at the time of such assignment the assured, the assignor, was, and he remained till his death, domiciled in Cape Colony,

CONFLICT OF LAWS—*continued.*
and the plaintiff was his wife. By the law of that colony such an assignment was void by reason of the alleged assignee being the wife of the assignor:—*Held*, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment. LEE *v.* ABDY - - - - 309

CONSIDERATION, STATEMENT OF — Bill of sale - - - - - 204
See BILL OF SALE. 2.

COSTS — Security for — Appeal—Bankruptcy—Increasing amount of deposit—Special circumstances - - - 351
See BANKRUPTCY.

—— Bankruptcy—Trustee in bankruptcy—Order to pay costs personally—Unreasonable rejection of proof - - - 488
See BANKRUPTCY. 14.

—— Official receiver—Bankruptcy—Appearance on appeal - - - - 244
See BANKRUPTCY. 17.

—— Returning officer—Taxation—Registrar of county court — Jurisdiction to review taxation - - - - 96
See PARLIAMENT.

—— Claim on contract and counter-claim—Costs of issues—Plaintiff recovering less than 20*l.* and defendant recovering a larger amount - - - - 606
See PRACTICE. 3.

—— Taxation—Joinder of plaintiffs—Separate causes of action—Judgment for one plaintiff and against the other - 625
See PRACTICE. 4.

—— Trial with jury—Jurisdiction of judge to make order as to costs—Appeal - 373
See PRACTICE. 5.

COUNTY—Liability to repair bridge—Acquiescence in building of bridge—County of a town - - - - 424
See BRIDGE.

COUNTY COURT — Appeal to High Court—Special case - - - 761
See PRACTICE. 6.

—— Bankruptcy—Case stated for opinion of High Court—Appeal from High Court
See BANKRUPTCY. 7. [275

—— Bankruptcy—Refusal of registrar of county court to carry out order of Divisional Court—Jurisdiction - - 389
See BANKRUPTCY. 15.

—— Returning officer — Charges — Taxation—Application to registrar - - 788
See PARLIAMENT. 2.

—— Returning officer — Costs—Jurisdiction to review taxation - - - 96
See PARLIAMENT.

COURT—Report of proceedings in court of justice—Libel—Privilege - - 636
See DEFAMATION.

COVENANT — To leave premises in repair—Repairs no longer necessary to command rent—Measure of damages - 770
See LANDLORD AND TENANT. 2.

COVENANT—*contined.*

—— To pay rates, &c.—Metropolis Management Acts—Owner's proportion of cost of paving street - - - - - 212
See LANDLORD AND TENANT. 3.

CREDITOR—Security—Amendment of valuation —Bankruptcy - - - - 728
See BANKRUPTCY. 12.

CRIMINAL LAW—*Evidence—Deposition, Admissibility of*—30 & 31 *Vict. c.* 35, *ss.* 6, 7—*Notice of Intention to take Deposition.*] The 6th section of the 30 & 31 Vict. c. 35, provides in cases of indictable offences for the taking of the statements on oath or affirmation of persons dangerously ill and not likely to recover, and for the reading of the same in evidence under certain circumstances, "provided it be proved to the satisfaction of the Court (inter alia) that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence:"—*Held* (by Lord Coleridge, C.J., and Denman, Field, and Mathew, JJ., Day, J., dissenting), that the notice intended by the section is a notice in writing, and that such a statement was inadmissible against a prisoner where he had only had oral notice of the intention to take the same, although he was present when the statement was taken. THE QUEEN *v.* SHURMER C. C. R. 323

2. —— *Indictment, Form of—Election Law—Corrupt Practice—Description of Offence charged —Corrupt Practices Prevention Act*, 1863 (26 & 27 *Vict. c.* 29), *s.* 6—*Corrupt & Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 3, 6, 53.] The prisoner was tried and convicted upon an indictment which alleged that at an election for members of parliament for the borough of Ipswich holden on the 25th of November, 1885, he was guilty of corrupt practices against the form of the statute in that case made and provided. It was proved at the trial that he had promised money to two voters to induce them to vote. After verdict the objection was taken by the prisoner's counsel that the indictment was bad, because it did not sufficiently describe the nature of the offence with which the prisoner was charged:—*Held* (by Lord Coleridge, C.J., and Field and Mathew, JJ., Denman and Day, JJ., dissenting), that, if the indictment were defective, the defect was cured after verdict.—By Lord Coleridge, C.J., and Denman, Mathew, and Day, JJ., the indictment was defective, and on application before verdict might have been quashed.—By Denman and Day, JJ., the defect in the indictment was not cured after verdict.—By Field, J., *semble*, the indictment was good by virtue of 26 & 27 Vict. c. 29, s. 6, and 46 & 47 Vict. c. 51, s. 53. THE QUEEN *v.* STROULGER [C. C. R. 327

3. —— *Property obtained by False Pretences—Pledge of, to Innocent Party—Sale of by him—Conviction of Fraudulent Pledgor—Power to order Restitution of Proceeds of Sale*—24 & 25 *Vict. c.* 96, *ss.* 1, 100.] Under 24 & 25 Vict. c. 96, s. 100—which enacts that if any person guilty, inter alia, of obtaining any property by false pretences is convicted thereof, in such case the property shall be restored to the owner or his representative, and in every such case the Court

CRIMINAL LAW—*continued.*

before whom any such person shall be tried, shall have power to order the restitution thereof in a summary manner—the Court has jurisdiction to entertain an application for the restitution of the proceeds of the property as well as of the property itself.—Such an application ought only to be granted if the proceeds are in the hands of the convict or of an agent who holds them for him. THE QUEEN *v.* JUSTICES OF CENTRAL CRIMINAL COURT - - - - - - - 598

4. —— *Unlawful and malicious wounding—Malice*—24 & 25 *Vict. c.* 100, *s.* 20—*Blow aimed at one Person accidentally wounding another.*] The prisoner, in striking at a man, struck and wounded a woman beside him. At the trial of an indictment against the prisoner under 24 & 25 Vict. c. 100, s. 20, for unlawfully and maliciously wounding her the jury found that the blow was unlawful and malicious and did in fact wound her, but that the striking of her was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected. The prisoner was convicted:—*Held* (distinguishing *Reg. v. Pembliton*, Law Rep. 2 C. C. 119), that the conviction was right. THE QUEEN *v.* LATIMER [C. C. R. 359

—— Malicious prosecution—Malicious application for search warrant - - 338
See MALICIOUS PROSECUTION.

CROWN, PREROGATIVE OF—*Right to Trial at Bar—Merchant Shipping Act*, 1876 (39 & 40 *Vict. c.* 80), *s.* 10—*Detention of Ship for Survey—Action against Board of Trade—Interest of Crown—Change of Venue—Crown Suits Act*, 1865 (28 & 29 *Vict. c.* 104), *s.* 46.] By the Crown Suits Act, 1865, s. 46, where in any cause in which the Attorney-General is entitled on behalf of the Crown to demand as of right a trial at bar he states to the Court that he waives that right, "the Court on the application of the Attorney General shall change the venue to any county he may select:"—*Held*, that an action under 39 & 40 Vict. c. 80, s. 10, against the Secretary of the Board of Trade, to recover damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the Attorney General is entitled to demand as of right a trial at bar in such an action, and that the Court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried. DIXON *v.* FARRER - 658

CROWN—Trinity House—How far department of Crown—Liability for negligence 795
See NEGLIGENCE.

DAMAGES—Measure of—Covenant to leave premises in repair—Repairs no longer necessary to command rent - - 770
See LANDLORD AND TENANT. 2.

—— Measure of—Loss of goods—Carrier by sea
See SHIP. 2. [316

DEFAMATION—*Libel—Privilege—Report of Proceedings in Courts of Justice—Publication of Judgment alone.*] A fair and accurate report of the judgment in an action, published bonâ fide, and without malice, is privileged, although not

DEFAMATION—*continued.*
accompanied by any report of the evidence given at the trial.—Defendants published in the form of a pamphlet a report of the judgment delivered in a former action which plaintiff had brought against them. The pamphlet contained no separate report of the evidence given at the trial, and there were passages in the judgment reflecting on plaintiff's character. In an action for libel in respect of such publication the jury found that the pamphlet was a fair, accurate, and honest report of the judgment, and was published bonâ fide and without malice:—*Held*, affirming the judgment of Day and Wills, JJ., that it was not necessary to ask the jury whether the pamphlet was a fair report of the trial, that the right questions had been left to the jury, and defendants were entitled to judgment on the findings. MACDOUGALL *v.* KNIGHT & SON - - - - **C. A. 636**

DEPOSITION—Admissibility of—Notice of intention to take deposition—30 & 31 Vict. c. 35, ss. 6, 7 - - - **323**
See CRIMINAL LAW.

DESCRIPTION — Insufficiency — Bill of sale—Goods assigned - - - **74**
See BILL OF SALE. 10.

DISCOVERY — Interrogatories — Disclosures of names of persons probably to be witnesses - - - - **154**
See PRACTICE. 7.

—— Interrogatories—Sufficient affidavit of documents - - - - **101**
See PRACTICE. 8.

DISTRESS — Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61)—Bailiffs' fees on levy - - - - **714**
See LANDLORD AND TENANT.

—— Exemption from—Gas company—Gas stoves let on hire - - - - **619**
See GAS COMPANY.

—— Landlord and tenant—Things to be dealt with in the way of trade - - **494**
See LANDLORD AND TENANT. 4.

DIVORCE—Damages payable by co-respondent in divorce suit — Order for committal — Judgment creditor - - - **718**
See BANKRUPTCY. 6.

DOMICIL — Company with registered office in Scotland—Service of writ out of jurisdiction—Action for breach of contract [421
See PRACTICE. 17.

—— Conflict of laws—Policy of life insurance—Assignment abroad—Husband and wife [309
See CONFLICT OF LAWS.

EASEMENT—Lands and Railways Clauses Consolidation Acts — Way of necessity — Compensation - - - **12**
See COMPENSATION.

ECCLESIASTICAL LAW—*Incumbents' Resignation Act*, 1871 (34 & 35 *Vict. c.* 44), *ss.* 8, 10, 11—*Pension to retiring Incumbent*—"*Net Annual Value*" *of Benefice.*] By s. 8 of the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), it is provided that the pension which may be allowed

ECCLESIASTICAL LAW—*continued.*
to a retiring incumbent shall in no case exceed one third part of "the annual value of the benefice resigned"; and by s. 11 the annual value for the purposes of the Act is defined to be the "net annual value" after making certain deductions therein specified:—*Held*, that the amount of the retiring pension is to be fixed with reference to the net annual value of the benefice at the date of the incumbent's resignation; and that, having been once fixed, it is not liable to subsequent alteration in consequence of a diminution in the net annual value of the benefice through agricultural depression or through the formation of a part of the parish into a district chapelry. ROBINSON *v.* DAND - - **341**

ELECTION—Parliament—Costs—Charges of returning officers—Taxation - - **96**
See PARLIAMENT.

—— Parliament—Corrupt practices—Indictment, form of—Description of offence charged [327
See CRIMINAL LAW. 2.

—— Parliament—Right to vote—Alien—Persons born in Hanover before the accession of Queen Victoria - - - **54**
See PARLIAMENT. 3.

ELEGIT—Sale of land—Registration of judgment - - - - - **743**
See JUDGMENT CREDITOR.

ELEMENTARY EDUCATION ACTS—*Election of School Board—Vote—Ballot Papers, validity of—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *Sched. II.—Elementary Education Act*, 1873 (36 & 37 *Vict. c.* 86), *Sched. II.—General Order of Education Department of Nov.* 26, 1884.] The Ballot Act, 1872, Sched. II., which applies to municipal elections, directs that a voter shall vote by placing a cross on the right hand side of the ballot paper opposite the name of each candidate for whom he votes. A General Order of the Education Department made under the Elementary Education Acts provides that the poll at elections of school boards in boroughs shall be conducted in like manner as the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and the provisions of that Act shall, subject to the provisions of this Order, apply to elections of school boards, provided that—"Every voter shall be entitled to a number of votes equal to the number of the members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he thinks fit. The voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidate in lieu of a cross, and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly:"—*Held*, applying the principle of *Woodward* v. *Sarsons* (Law Rep. 10 C. P. 733), that the provisions of the General Order and of the Ballot Act, 1872, were sufficiently complied with where ballot papers at the election of a school board in a borough were marked otherwise than in the mode prescribed by the Order, if it could be ascertained with reasonable certainty for whom the voter in each case intended to vote, and how many votes he intended to give, and if

ELEMENTARY EDUCATION ACTS—*continued.*
it appeared that he had not intended to give a greater number of votes than there were members of the school board to be elected. Applying the above principles, the Court held that ballot papers marked by placing crosses instead of figures, or crosses and figures, or single strokes, opposite the names of candidates, were valid. PHILLIPS *v.* GOFF - - - - - - 805

ELEMENTARY EDUCATION—School board—Poor-rate—Occupation of schools—Rateable values - - - - 738
See POOR-RATE. 3.

ESTOPPEL—Negligent dealing with post office order—Wrongful conversion - 705
See TROVER.

EVIDENCE—Bankruptcy—Scheme of arrangement—Discovery of debtor's property—Power to summon witnesses for examination - - - - - 238
See BANKRUPTCY. 16.

—— Deposition, admissibility of—Notice of intention to take deposition - - 323
See CRIMINAL LAW.

—— Vivâ voce—Motion — Bankruptcy—Special leave - - - - - 1
See BANKRUPTCY.

FALSE PRETENCES—Property obtained by false pretences—Pledge to innocent party—Conviction of fraudulent pledgor—Power to order restitution of proceeds of sale
See CRIMINAL LAW. 3. [598

FEES—Middlesex—Registration—7 Anne, c. 20
See MIDDLESEX. [783

FIREPLUG—Wearing away of road—Nuisance—Liability of waterworks company 462
See WATERWORKS.

FOREIGN LAW—Chose in action—Assignment abroad—Policy of life insurance—Husband and wife—Domicil - - 309
See CONFLICT OF LAWS.

FORFEITURE—Settlement—Life estate—Bankruptcy on alienation - - 275
See BANKRUPTCY. 7.

FRAUDULENT CONVEYANCE — Bankruptcy—Voluntary settlement—Pending action—Intent to defeat or delay creditors 290
See BANKRUPTCY. 11.

GAMING—Master and servant—Misconduct 536
See MASTER AND SERVANT.

GARNISHEE ORDER — Execution creditor — Completion of attachment—"Receipt" of debt—Money paid into Court to abide further order - - - 182
See BANKRUPTCY. 5.

GAS COMPANY—*Gas-stoves let for Hire—Exemption from Distress—"Fittings for the Gas"—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 14.] By s. 14 of the Gasworks Clauses Act, 1847, "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas . . . . and such meters and fittings shall not be subject to distress . . . . for rent of the premises

GAS COMPANY—*continued.*
where the same may be used":—*Held*, reversing the judgment of Mathew, J., that a gas-stove let for hire was within the words "fittings for the gas," and therefore was not subject to distress for rent. GASLIGHT AND COKE COMPANY *v.* HARDY - - - - - C.A. 619

HANOVER — Person born in Hanover before accession of Queen Victoria—Right to vote - - - - - 54
See PARLIAMENT. 3.

HIGHWAY—*Expenses of—Highway District—Rural Sanitary District—Coincident in Area—Subtraction of Parish—Contribution from*—25 & 26 *Vict. c.* 61, *s.* 39; 41 & 42 *Vict. c.* 77, *ss.* 3, 4, 7.] The provisions in 25 & 26 Vict. c. 61, s. 39, for altering a highway district by subtracting from it any parish by order of the county authority are not repealed by 41 & 42 Vict. c. 77, s. 3, providing for the formation of highway districts coincident in area with rural sanitary districts, and, by s. 4, for the exercise by the rural sanitary authority of the powers of a highway board within their district, and for the dissolution of the existing highway board. Therefore, although by an order made under 41 & 42 Vict. c. 77 the area of a highway district may have become coincident with the area of a rural sanitary district, and the rural rural sanitary authority have been duly authorized to exercise the powers of a highway board, they cannot enforce contribution to the expenses of a board from a parish which has been duly substracted from the district by an order under 25 & 26 Vict. c. 61, s. 39. GUARDIANS OF SHEPPEY UNION *v.* OVERSEERS OF ELMLEY 364

2. —— *Summary Proceeding for non-repair—Highway District — Admission of Liability by Waywarden—Special Case under Summary Jurisdiction Act*, 1879—*Right of Appeal from Judgment of Divisional Court*—5 & 6 *Wm. c.* 50, *ss.* 94, 95—25 & 26 *Vict. c.* 61, *s.* 18—41 & 42 *Vict. c.* 77, *ss.* 3, 5, 7, 10—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.] When proceedings are taken before justices, under s. 18 of the Act 25 & 26 Vict. c. 61, for the non-repair of a highway in a parish forming part of a highway district, a bonâ fide admission by the waywarden of the parish that the road is a highway which the parish is bound to repair, is binding on the highway board, and it is not competent for them, after such an admission, to deny these facts so as to oust the jurisdiction of the justices.—Judgment of Queen's Bench Division (16 Q. B. D. 565) affirmed.—An appeal lies to the Court of Appeal from the judgment of a Divisional Court upon a special case stated under s. 33 of the Summary Jurisdiction Act, 1879, in proceedings before justice for the non-repair of a highway, the judgment not being "a judgment in any criminal cause or matter" within s. 47 of the Judicature Act, 1873. LOUGHBOROUGH HIGHWAY BOARD *v.* CURZON - - C.A. 344

—— Nuisance—Fireplug—Wearing away of road—Liability of waterworks company 462
See WATERWORKS.

—— Nuisance—Waterworks company — Guard boxes protecting stop valves - 475
See WATERWORKS. 2.

HIGHWAY—*continued.*

—— Surface—Repairs to roadway of bridge and approaches—Highway Act, 1835 (5 & 6 Wm. 4, c. 56), s. 21 - - 424
See BRIDGE.

—— Bill of sale—Seizure of goods in street 234
See BILL OF SALE. 12.

HUSBAND AND WIFE—*Wife's Separate Property—Income of Property subject to Restraint upon Anticipation—Judgment Summons—Proof of Means—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1.] Judgment for a debt and costs was recovered against a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint upon anticipation, unless by reason of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint. Upon an application for an order of committal against her under s. 5 of the Debtors Act, 1869, the only evidence of her ability to pay was that since the date of the judgment she had received sufficient income of separate property subject to a restraint upon anticipation. —*Held*, that no order could be made against her upon that evidence, because s. 5 did not apply to the judgment. DRAYCOTT *v.* HARRISON - 147

2. —— *Wrongs committed by Wife after her Marriage — Liability of Husband — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2.] The Married Women's Property Act, 1882, does not abolish the liability of a husband for his wife's wrongful acts, and the plaintiff may sue the husband and wife jointly or the wife alone for wrongs committed by her after the marriage. SEROKA *v.* KATTENBURG - 177

—— Domicil—Conflict of laws—Life policy—Assignment abroad - - 309
See CONFLICT OF LAWS.

—— Married woman trading separately from her husband—Bankruptcy—Separate property—General power of appointment
See BANKRUPTCY. 9. [521

—— Separate estate—Settlement—General power of appointment—Bankruptcy - 167
See BANKRUPTCY. 8.

INCUMBENT—Retirement—Pension—Benefice—"Net annual value" - - 341
See ECCLESIASTICAL LAW.

INDICTMENT—Form of—Description of offence charged—Parliament—Election—Corrupt practices - - - 327
See CRIMINAL LAW. 2.

INN—*Licence—Transfer at Special Sessions—Limited Discretion to refuse*—32 & 33 *Vict. c.* 27, *ss.* 8, 19; 33 & 34 *Vict. c.* 29, *s.* 4, *sub-s.* 4, *s.* 7.] The Wine and Beerhouse Act (1869) Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 4, sub-s. 4—which enacts that it shall be in the discretion of the justices to whom an application for a transfer of a licence is made either to allow or refuse the application, or to adjourn the consideration thereof—is intended only to affect the procedure as to adjournment at sessions for the transfer of licences.—Therefore on an application to justices

INN—*continued.*

at special sessions for a transfer of a licence to sell beer to be consumed on or off premises in respect of which such a licence was in force on the 1st of May, 1869, and has since been renewed from time to time, the discretion of the justices is limited as it is on an application at the general licensing meeting for a grant by way of renewal of the licence, and the application for the transfer can only be refused on one or more of the four grounds specified in the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), ss. 8, 19. SIMONDS *v.* JUSTICES OF BLACKHEATH - - - 765

—— Club—Selling liquor without licence—Unauthorized sale by steward - 132
See LICENSING ACTS.

INTEREST—Bill of sale—Interest upon interest—Postponement of redemption - 80
See BILL OF SALE. 8.

INTERPLEADER—Goods taken in execution—Title of third party—Right of execution creditor to set up jus tertii against claimant - - - - - 544
See PRACTICE.

—— Jurisdiction of master—Appeal to Judge at Chambers—Appeal to Court of Appeal
See PRACTICE. 10. [128

INTERROGATORIES—Material facts—Disclosure of names of persons probably to be witnesses—Libel—Justification - 154
See PRACTICE. 7.

INTERROGATORY—Sufficiency of affidavit of documents—Title to land—privilege
See PRACTICE. 8. [101

INSURANCE (LIFE) — Policy — Assignment abroad—Husband and wife—Domicil
See CONFLICT OF LAWS. [309

INSURANCE (MARINE) — *Concealment — Principal and Agent—Concealment of Material Facts—Broker employed by Shipowner, but not being Broker through whom Policy effected.*] A policy of marine insurance is vitiated by the concealment of a material fact by a broker employed by the assured to effect an insurance, although he is not the broker through whom the insurance is ultimately effected, and although the assured is innocent of all fraud,—So *held*, by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting.—*Fitzherbert* v. *Mather* (1 T. R. 12), *Gladstone* v. *King* (1 M. & S. 35), and *Proudfoot* v. *Montefiore* (Law Rep. 2 Q. B. 511) commented on.—The plaintiff instructed a broker to effect for him a re-insurance upon an overdue ship; whilst the broker was acting on behalf of the plaintiff he received information of a material fact tending to shew that the ship was lost; the broker did not communicate this information to the plaintiff, and failed to obtain an insurance for him. Afterwards the plaintiff, through another broker, effected a policy of insurance, lost or not lost, which was underwritten by the defendant. The ship had in fact been lost some time before the plaintiff tried to reinsure her, but neither the plaintiff nor the broker who effected the insurance, knew of or concealed from the defendant any fact tending to shew that the ship had been lost.—*Held*, by Lindley and Lopes, L.JJ., Lord Esher, M.R.,

INSURANCE (MARINE)—*continued.*
dissenting, that the plaintiff could not recover upon the policy underwritten by the defendant. Blackburn *v.* Vigors - - - C. A. 553

2. —— *General Words—Perils insured against—Splitting of Air Chamber of Donkey Engine.*] A steamer was insured by a policy in the ordinary form on the ship and her machinery, including the donkey engine. The donkey engine was employed in the ordinary course of navigation in pumping water into the boilers, and in consequence of a screw valve which should have been open being, either by negligence or by accident, closed, the water was forced into the air chamber of the donkey engine which was split open:—*Held*, by Lindley and Lopes, L.JJ. (Lord Esher, M.R., dissenting), that the injury was a peril insured against under the general words of the policy. Hamilton *v.* Thames and Mersey Marine Insurance Company - C. A. 195

3. —— *Risk of Craft till Goods landed—Transhipment from Lighters into export Vessel.*] A policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely landed" does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel. Houlder *v.* Merchants Marine Insurance Company - - - - C. A. 354

JUDGMENT CREDITOR—*Receiver—Land subject to Equitable Mortgage*—23 & 24 *Vict. c.* 38—27 & 28 *Vict. c.* 112—*Non-registration of Order appointing Receiver.*] Since 27 & 28 Vict. c. 112, where land has been actually delivered in execution by writ of elegit or other lawful authority, it is unnecessary to register the judgment, writ, or other process of execution except for the purpose of obtaining under s. 4 of the Act a summary order for sale; but before any creditor to whom any land of his debtor shall have been actually delivered in execution can obtain such summary order his writ or other process of execution must be duly registered pursuant to s. 3 of the Act.—An order for the appointment of a receiver is a "process of execution" within the meaning of the Act. In re Pope - - - C. A. 743

JUDGMENT—Assignment—Bankruptcy notice *See* Bankruptcy. 2. [303

—— Bankruptcy notice—"Final judgment"—"Balance order"—Contributory—Winding-up of Company - - 357 *See* Bankruptcy. 3.

—— Consent order—Omission to file order—Right to prove in bankruptcy for debt *See* Bankruptcy. 14. [488

—— Partnership firm—Bankruptcy notice—Leave to issue execution against member of firm - - - - 755 *See* Bankruptcy. 4.

JUDGMENT SUMMONS—Married woman—Separate estate—Restraint upon anticipation—Proofs of means - - - 147 *See* Husband and Wife.

—— Order for committal—Receiving order in lieu of committal—Damages payable by co-respondent in divorce suit - 718 *See* Bankruptcy. 6.

JUSTICES — Jurisdiction — Local Government Acts—Order for owner to abate nuisance—Premises leased for years - 584 *See* Local Government Acts. 2.

LANDLORD AND TENANT—*Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 49 *to* 52, *and 2nd Sched.—Distress for Rent—Bailiff's Fee on Levy—Percentage.*] In distress for rent under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), the landlord, and not the bailiff, is "the person making the distress" under s. 49, and is therefore entitled to the "percentage" referred to in the second schedule to the Act. Coode *v.* Johns - - - - 714

2. —— *Covenant to deliver up Premises in sufficient Repair—Damages, Measure of—Repairs no longer necessary to command Rent—Indemnity against Covenant to leave Premises in repair—Bankruptcy of Surety during Term—Proof by Person indemnified—"Liability present or future, certain or contingent"—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] In an action against the assignee of a lease of a house for breach of covenant to leave the premises in repair at the end of the term, it appeared that owing to changes in the surrounding property the house had so far altered in value since the commencement of the lease that it would be as valuable for letting purposes if some of the repairs required by the covenant according to its strict meaning were either omitted or executed at a cheaper rate than was usual under such a covenant:—*Held*, by Denman, J., that the facts above mentioned were no ground for limiting the liability of the defendant under the covenant, and that the measure of damages for a breach of it was the amount required to put the premises into such repair as was originally contemplated by the covenant.—In an action upon an agreement to indemnify against a covenant to leave premises in repair at the end of the term, it appeared that the agreement was made in 1873, that the defendant became bankrupt in 1875, and that the term expired in 1883:—*Held*, by Denman, J., that the defendant's bankruptcy was no answer to the action, for his liability was not "a liability present or future, certain or contingent," within s. 31 of the Bankruptcy Act, 1869, so as to be proveable in the bankruptcy. Morgan *v.* Hardy - - - - 770

3. —— *Covenant to pay Rates, &c.—Owner's Proportion of paving Street—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105, *and Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 96.] The lessee of a house in a new street within the metropolitan district covenanted with his lessor to pay during the term "all existing and future taxes, rates, assessments, land-tax, tithe or tithe rent-charge, and outgoings of every description for the time being payable either by the landlord or tenant in respect of the said premises":—*Held*, that the owner's proportion of the cost of paving the street under 25 & 26 Vict. c. 102, s. 96, was an "outgoing" payable by the lessee under this covenant. Aldridge *v.* Ferne - - - - 212

4. —— *Distress—Privilege from Distress—Things on the demised Premises to be dealt with in the way of Trade—Delivery for Trade Purposes,*

LANDLORD AND TENANT—*continued.*

whether necessary in order to make Privilege apply.] Things belonging to a third person, which are on demised premises for the purpose of being wrought up or manufactured by the tenant in the way of his trade are not privileged from distress by the landlord unless they have been sent or delivered by such third person to the tenant for that purpose. Judgment of Pollock, B., affirmed. CLARKE *v.* MILLWALL DOCK COMPANY [C. A. 494

—— Action for recovery of land—Writ specially indorsed, Order III., r. 6 (F) - 97
See PRACTICE. 15.

—— Distress—Exemption from—Gas stoves let for hire - - - - 619
See GAS COMPANY.

LANDS CLAUSES ACT — Compensation—Land injuriously affected during execution of works - - - - 12
See COMPENSATION.

—— Part of building estate taken for sewage farm—Value of other parts depreciated—Compensation - - - 447
See COMPENSATION.

LIBEL — Justification — Interrogatories — Disclosure of names of persons probably to be witnesses - - - - 154
See PRACTICE. 7.

—— Privilege—Report of proceedings in Court of Justice - - - - - 636
See DEFAMATION.

LICENSING ACTS — *Club — Selling without Licence—Unauthorized Sale by Steward—Liability of Trustee—6 Geo. 4, c. 81, s. 26; 4 & 5 Wm. 4, c. 85, s. 17; 23 Vict. c. 27, s. 19.*] The appellants, who were trustees and members of the managing committee of a club, were convicted under the Licensing Acts for selling liquor without a proper license to persons not members of the club. It appeared that the liquor was sold in the club premises by the steward of the club, who in selling it acted contrary to the orders of the appellants, and without their knowledge or assent. The money which he received for the liquor was paid by him to the account of the club:—*Held*, that the conviction was wrong, for the appellants were not, under the circumstances, responsible for the act of the steward. NEWMAN *v.* JONES 132

—— Beer house—Transfer of licence—Discretion to refuse - - - - 765
See INN.

LIGHTER—Policy of marine insurance—Risk of craft till goods landed - - 354
See INSURANCE (MARINE.) 3.

LOCAL GOVERNMENT ACTS — *Arbitration — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55)—*Power to enlarge Time for making Award — Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 15.] The Court cannot enlarge the time for making an award under the Public Health Act, 1875 (38 & 39 Vict. c. 55), beyond the period limited in s. 180. IN RE MACKENZIE - 114

2. —— *Nuisance — Abatement — Owner — Default—Nuisance arising from defective Construction of Structural Convenience—Jurisdiction of Justices to order Owner to abate Nuisance where Premises leased for Years—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 95, 96.] A local authority served the owner of premises with a notice, under s. 94 of the Public Health Act, 1875, requiring him within seven days to abate a nuisance arising from the defective construction of a structural convenience, and for that purpose to execute certain specified works. Having failed to comply with the notice, the owner was summoned under s. 95 before a court of summary jurisdiction, and on the hearing it was proved that the premises in question were occupied by a tenant to the owner under a lease for twenty-one years containing the usual covenants:—*Held*, that the owner, even although he could not enter upon the premises and execute the works without the tenant's permission, had "made default" in complying with the requisitions of the notice within the meaning of s. 95, and therefore that the justices had jurisdiction to make an order, under s. 96, requiring him to abate the nuisance. PARKER *v.* INGE - 584

3. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 5, 10, 12, 264, 341—*Improvement Commissioners—Urban Sanitary Authority—Notice of Action—Act "done under the provisions of this Act"—Penalty.*] The effect of the Public Health Act, 1875, which makes improvement commissioners under local Acts urban sanitary authorities, is to reconstitute them as new bodies under the Act, vesting in them as such new bodies the powers given by the local Acts as well as those given by the Public Health Act: and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local Acts are acting under the Public Health Act, 1875; and consequently are entitled in respect of such act to any protection or privilege given by that Act to members of local authorities acting under its provisions. LEA *v.* FACEY 139

4. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Sewering and paving "Street"—Apportionment of Expenses—Summary Proceedings against Frontager — Right to dispute Liability before Justices.*] In proceedings before justices under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, to recover from an owner of premises fronting a road his proportion of expenses incurred by the local authority in sewering, levelling, and paving it, the owner may dispute his liability by shewing that the road is not a "street," or that it is a "highway repairable by the inhabitants at large." ECCLES *v.* WIRRAL RURAL SANITARY AUTHORITY - - - - - 107

5. —— *Public Health Act*, 1875, *ss.* 4, 150, 257 —"*Street*"—*Private Road—Turnpike Road — Apportionment of Expenses by Surveyor conclusive — Land, Part of which fronted Street and Part did not—Jurisdiction, erroneous exercise of by Surveyor not excess of.*] A private road may be a street within the meaning of s. 150 of the Public Health Act, 1875. Where the apportionment of street improvement expenses by the surveyor under s. 150 of the Public Health Act, 1875, has not been disputed by a frontager in the manner pointed out by s. 257 of the Act, such apportionment is conclusive, and the frontager cannot set up, as a defence to proceedings for the recovery of

LOCAL GOVERNMENT ACTS—*continued.*
the sum apportioned, that he has been charged in respect of a greater extent of frontage than he possesses. So held, by the Court of Appeal, affirming the decision of the Queen's Bench Division. The owners of a road put up bars upon it and took tolls from the public for the passage of vehicles, horses, and cattle:—*Held*, by the Queen's Bench Division, that such road was not a turnpike road within the meaning of the exception contained in the definition of "street" given by s. 4 of the Public Health Act, 1875. MIDLAND RAILWAY COMPANY, APPELLANTS; WATTON, RESPONDENT - - - - - C. A. 30

LUGGAGE—Railway—Delivery to porter—Negligence - - - - - 215
See RAILWAY.

MACHINERY—Boiler works—Rateability 651
See POOR-RATE.

"MAINTENANCE"—*Action for—Grounds of Defence—Charity.*] An action will lie to recover damages caused to the plaintiff by the defendant's "maintenance" of a third person in legal proceedings between him and the plaintiff.—To such an action it is a good defence that the defendant assisted the third person from charitable motives, believing that he was a poor man oppressed by a rich man. It is not necessary that the defendant should have acted after full inquiry into the circumstances, but the defence will be equally available even if the defendant, had he made full inquiry, would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted.—Judgment of Wills, J., reversed. HARRIS *v.* BRISCO - C. A. 504

MALICE—Unlawfully and maliciously wounding —Blow aimed at one person accidentally wounding another - - - 359
See CRIMINAL LAW. 4.

MALICIOUS PROSECUTION—*Malicious Application for Search Warrant—Criminal Law—Reasonable Cause for Suspicion—Judicial Act—48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 10.*] By 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 10, it is provided that "if it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorizing any person named therein to search for . . . such woman or girl":—*Held*, that under this section the justice has a judicial duty to perform, and that his decision that there is reasonable cause for such suspicion is a protection to a person who bonâ fide applies for a search warrant, and is an answer to an action for maliciously causing the warrant to issue. HOPE *v.* EVERED - 338

MARRIED WOMAN—Trading separately from husband—Separate property—General power of appointment - - 521
See BANKRUPTCY. 9.

MARRIED WOMAN—*continued.*
—— Wrongs committed by wife after her marriage—Liability of husband - 177
See HUSBAND AND WIFE. 2.

MASTER AND SERVANT—*Dismissal of Servant—Misconduct of Servant—Gambling in "Differences" upon the Stock Exchange.*] The plaintiff had been employed as clerk by the defendants, who were merchants, for many years, and ultimately they agreed to retain him in their employment for a term of ten years. Before the expiration of that period the defendants discovered that the plaintiff had for many years previously been engaged in speculating in "differences" upon the Stock Exchange to the extent of many hundreds of thousands of pounds, and they thereupon dismissed him from their service:—*Held*, that the dismissal of the plaintiff was justifiable. PEARCE *v.* FOSTER - - - C. A. 536

2. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1—*Defect in Condition of Ways or Plant.*] The plaintiff was employed in a cooling-room in the defendant's brewery. In this room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim rising sixteen inches above the level of the passage but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast, and then came away suddenly, so that he fell back into the cooling vat and was scalded.—In an action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42):—*Held*, that the plaintiff could not recover, for there was no evidence that he had been injured by reason of any defect in the condition of the ways, works, or plant of the brewery, within the meaning of the Act. THOMAS *v.* QUARTERMAINE - - - - 41

3. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1—*Defect in "Works"—Wall in course of Construction—Not "used in or connected with the business of the employer."*] In the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1—defining the liability of employers for personal injury caused to their workmen (1) "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer"—the expression "works" must be taken to mean works already completed and not works in course of construction which are, on completion, to be connected with or used in the business of the employer. HOWE *v.* FINCH - - - 18

4. —— *Negligence—Employers' Liability Act* 1880 (43 & 44 *Vict. c.* 42)—*What Defences open to an Employer when sued under the Act—Contributory Negligence.*] An employer, when sued under the Employers' Liability Act, 1880, for personal injury to a workman caused by any of the matters mentioned in s. 1 of the Act, cannot avail himself of the defence that the injury was caused by the negligence of a fellow servant or that the workman had contracted to take upon himself the risks incident to the employment, but he may avail himself of the defence of contributory negligence on the part of the workman, and also, under s. 2, sub-s. 3, of his failure to give notice of the defect or negligence which

MASTER AND SERVANT—*continued.*

caused the injury.—Upon an appeal from the judgment of a county court awarding compensation under the Act, the High Court is not entitled to consider whether the findings are such as the High Court would have arrived at; but can only consider whether or not there was reasonable evidence to support them.—The deceased was employed as fireman at the defendant's brewery. In the engine-room, at some distance from the floor, was a valve to turn on steam to a donkey-engine. This valve was only reached by means of a ladder placed against a lower pipe, but, by reason of a bend in the last-mentioned pipe, the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose for which it was used. The defendant had himself seen the ladder so used. The deceased was found dead in the engine-room, having been apparently killed by the ladder slipping while he was upon it. In an action by his personal representative under the Employers' Liability Act, the county court judge found that there was a defect in the condition of the plant within the meaning of s. 1, sub-s. 1 of the Act, and that, although the deceased knew of the defect, he was excused from informing the defendant of it, because he was aware that the latter knew of it:—*Held*, that this finding was warranted by the evidence, and that contributory negligence on the part of the deceased was not necessarily proved by the mere fact that he knew that the work was of itself dangerous. WEBLIN *v.* BALLARD - - - - - 122

MAYOR'S COURT—Solicitor, privilege of, to be sued only in High Court - - 703
See PRACTICE. 14.

METROPOLIS—*Valuation Acts—Assessment Sessions—Appeal—Notice of Appeal—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 33.] The assessment committee of a union appealed, under s. 32 of the Valuation (Metropolis) Act, 1869, to the general assessment sessions against the valuation list of the respondent parish, and against the total gross and rateable values appearing therein, on the ground that those values were too low, and it appeared from the case stated by the appellants in compliance with the rules made under the Act that they sought to have the total values increased by shewing that the assessments in the valuation list of a large number of specified hereditaments were too low:—*Held*, that the appeal did not "relate to the unfairness or incorrectness of the valuation of any hereditament occupied by any person other than the appellant" within the meaning of s. 33 of the Valuation (Metropolis) Act, 1869; that those words applied only to appeals in which it was objected that the valuation of particular hereditaments was unfair or incorrect so far as it affected the assessment of the ratepayers of a parish inter se: and therefore that the appellants need not serve notice of appeal under s. 33 upon the occupiers of the specified hereditaments. THE QUEEN *v.* JUSTICES OF GENERAL ASSESSMENT SESSIONS FOR METROPOLIS 394

METROPOLIS MANAGEMENT ACTS—Landlord and tenant—Covenant to pay rates, &c.—Owner's proportion of cost of paving street - - - - 212
See LANDLORD AND TENANT. 3.

MIDDLESEX—*Registration of Deeds—Fees for registering Memorial, &c., under* 7 *Anne, c.* 20.] For registering a memorial of a deed of 199 words in the Middlesex Registry under 7 Anne c. 20, the fees claimed and received were,—1*s.* for "entry" of the memorial (under s. 11); 1*s.* 6*d.* for "administering the oath" of the signing and delivery of the memorial (under s. 5); 1*s.* for "indorsing a certificate of the said oath upon the memorial, and signing the same" (under s. 5); 1*s.* for the "certificate indorsed upon the deed to the effect that it had been registered, with the day and hour on which the memorial was entered or registered" (under s. 6):—*Held*, that these fees were warranted by the Act. MUNTON *v.* LORD TRURO [783

MORTGAGE—Building society—Dispute—Arbitration - - - - 609
See BUILDING SOCIETY.

—— Elegit—Registration of judgment—Sale of land - - - - - 743
See JUDGMENT CREDITOR.

MOTION—Viva voce evidence—Bankruptcy—Practice - - - - 1
See BANKRUPTCY.

MUNICIPAL ELECTION — *Town Councillor, Qualification of—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 11, *sub-s.* 3; *s.* 51—"*Qualified to elect*"—*Unqualified Person on the Burgess Roll.*] The Municipal Corporations Act, 1882, s. 11, sub-s. 3, provides that every person shall be qualified to be elected and to be a councillor who is at the time of election qualified to elect to the office of councillor:—*Held*, that a person who, though not qualified to be a burgess, had been enrolled on the burgess roll and was therefore entitled to vote under s. 51 of the Act, was not thereby qualified to be elected a councillor under s. 11, sub-s. 3. FLINTHAM *v.* ROXBURGH 44

NEGLIGENCE—*Liability—Corporation performing Public Duties—Servants of the Crown—Trinity House—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *Parts VI. and VII.*] By the Merchant Shipping Act, 1854, the superintendence and management of all lighthouses and beacons in England and the adjacent seas are vested in the Trinity House, subject to the existing jurisdiction of local lighthouse authorities: the Trinity House shall continue to hold and maintain all property vested in them in the same manner and for the same purposes as they have hitherto held and maintained the same, and extensive powers are given to them, to be exercised with the consent of the Board of Trade, in respect of the management and control of lighthouses and beacons which are subject to the jurisdiction of local authorities, and in other respects. The Act further provides that the light dues levied by the Trinity House shall be carried to the account of the Mercantile Marine Fund; that the expenses incurred in respect of the service of lighthouses and beacons shall be paid out of that fund; that the Trinity House shall account to the Board of Trade for their receipts and expenditure, and that their accounts shall be audited by the Commissioners of Audit:—*Held*, that the Corporation of Trinity House were not by virtue of the Merchant Shipping Act, 1854,

NEGLIGENCE—*continued.*
constituted servants of the Crown so as to exempt them from liability to an action for negligence in the performance of their duties. A beacon vested in the Corporation of Trinity House having become partially destroyed, they licensed G. to remove it, and in so doing he negligently left an iron stump sticking up under the water. In an action to recover damages caused thereby to the plaintiffs' ship:—*Held*, that the defendants were liable for G.'s negligence. Gilbert *v.* Corporation of Trinity House - - - - 795

—— Employers' Liability Act, 1880—Defect in condition ways, works, or plant - 414
See Master and Servant. 2.

—— Employers' Liability Act, 1880—Defect in "works"—Wall in course of construction - - - - - 187
See Master and Servant. 3.

—— Highway—Fire-plug—Wearing away of road—Liability of Waterworks Company 462
See Waterworks.

—— Master and servant—Employers' Liability Act - - - - - 122
See Master and Servant. 4.

NEGOTIABLE INSTRUMENT—Post office order—How far transferable by delivery—Wrongful conversion - - - 705
See Trover.

NEW TRIAL—Application for—Power of Court of Appeal to give judgment — Order LVIII., r. 4 - - - - 603
See Practice.

—— Verdict against weight of evidence—Report of judge - - - - 736
See Practice. 12.

NOTICE—Appeal—Sessions—Bastardy—Grounds of appeal - - - - 49
See Bastardy.

—— Intention to take deposition—Criminal law
See Criminal Law. [323

NOTICE OF ACTION—Improvement Commissioners—Urban sanitary authority 139
See Local Government Acts. 3.

NOTICE OF MOTION—Amendment—Appeal from chambers—Notice for day not in the sittings - - - - - 180
See Practice. 11.

NUISANCE — Abatement—Local Government Acts—Premises leased for years—Owner—Default - - - - - 584
See Local Government Acts. 2.

—— Highway—Fire-plug—Wearing away of road—Liability of waterworks company 462
See Waterworks.

—— Highway—Waterworks company—Guard boxes protecting stop valves in communication pipes - - - - 475
See Waterworks. 2.

OFFICIAL RECEIVER—Accounts rendered to trustee—Objection by trustee—Board of Trade—Practice - - - - 4
See Bankruptcy. 13.

—— Bankruptcy—Appearance on appeal—Costs
See Bankruptcy. 17. [244

PARLIAMENT — *Election — Costs — Charges of Returning Officers — Taxation — Parliamentary Elections (Returning Officers) Act*, 1875 (38 & 39 *Vict. c.* 84), *s.* 4.] Where the accounts of a returning officer have been taxed by the registrar of a county court under the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), s. 4, the county court judge has no jurisdiction to review the registrar's taxation. The Queen *v.* Judge of Lambeth County Court [96

2. —— *Election—Returning Officer's Charges—Taxation—Parliamentary Elections (Returning Officers) Act*, 1875 (38 & 39 *Vict. c.* 84), *s.* 4—*Application to "the Court," what is.*] Sect. 4 of 38 & 39 Vict. c. 84, enacts that an application to tax the charges of the returning officer at a parliamentary election may be made, within fourteen days from the delivery of his account, to the county court having jurisdiction at the place of nomination for the election:—*Held*, that an application made within the specified time to the registrar of the county court when the judge was not sitting, was properly made within s. 4. The Queen *v.* Judge of Bloomsbury County Court [C. A. 788

3. —— *Right to vote—Aliens—Persons born in Hanover before the Accession of Queen Victoria.*] Persons born in Hanover before the accession of Queen Victoria to the throne of the United Kingdom and not naturalized, are, though resident in the United Kingdom, aliens, and not entitled to vote at the election of members of Parliament. Dicta in *Calvin's Case* (Coke Rep. part vii. at p. 46, 27 B) dissented from. In re Stepney Election Petition. Isaacson *v.* Durant - - - - - - 54

—— Election—Corrupt practices—Indictment—Description of offence charged - 327
See Criminal Law. 2.

PARISH—Subtraction from highway district—Expenses of highway—Contribution
See Highway. [364

PARTIES—Joinder of plaintiffs—Separate causes of action—Judgment for one plaintiff and against the other—Costs—Taxation
See Practice. 4. [625

PARTNER — Judgment against firm—Member not served with writ — Bankruptcy notice - - - - 755
See Bankruptcy. 4.

PENALTY—Action for—Notice of action—Improvement commissioners—Local Goverment Acts - - - 139
See Local Government Acts. 3.

PENSION—Retiring incumbent—"Net annual value" - - - - 341
See Ecclesiastical Law.

PLEADING—Seduction—Administering drugs to procure abortion—Application to strike out paragraph - - - 93
See Practice. 13.

PLEDGE—Delivery of goods to pledgee—Document regulating rights of pledgee—Bill of sale - - - - 690
See Bill of Sale. 11.

POOR LAW—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35—*Widow—Derivative Settlement.*] Upon appeal against an order for the removal of a widow it appeared that her husband was at the time of his death settled in a parish in the appellant union, and that she had acquired no settlement since his death:—*Held*, that the term "wife" in 39 & 40 Vict. c. 61, s. 35, did not include a widow; that the pauper did not therefore take the settlement of her deceased husband, and that the order for her removal must be quashed. GUARDIANS OF MAIDSTONE *v.* GUARDIANS OF HOLBORN - - - - - - 817

POOR-RATE — *Rating of Boiler Works — Machinery and Plant capable of being removed without Injury or Structural Damage—6 & 7 Wm. 4, c.* 96, *s.* 1.] In assessing premises used as boiler works to the poor-rate, machinery and plant which are essentially necessary to the business, and which are intended to remain attached to the premises so long as they are used for their present business, may be taken into account as enhancing the rateable value of the property, although they are not so affixed to the soil as to form part of the freehold, and can be removed without injury to themselves or structural damage to the freehold. — *Laing* v. *Bishopwearmouth* (3 Q. B. D. 299) discussed and followed. TYNE BOILER WORKS COMPANY *v.* OVERSEERS OF LONGBENTON - - - - - - - 651

2. —— *Principle of Assessment—Land occupied by Local Authority for Public Purposes—Waterworks—Water-rate in aid of Water-rents.*] The appellants, a local board incorporated by a special Act (39 & 40 Vict. c. clxxxv.), were empowered by the Act to levy a public water-rate, but it was provided that they should not levy any higher rate than might be required to discharge so much of the expenses of maintaining the waterworks, &c., as the amount of water-rents and other payments for a supply of water should not be sufficient to discharge:—*Held* (affirming the judgment of the Queen's Bench Division), that, in assessing the appellants to the poor-rate in respect of their reservoirs, pipes, and works, the amount collected by means of a water-rate ought to be taken into account. DEWSBURY WATERWORKS BOARD *v.* ASSESSMENT COMMITTEE OF PENISTONE UNION - - - C. A. 384

3. —— *Rateable Value—Assessment of Schools —Hypothetical Tenant—School Board—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 4.] In assessing to the poor-rate schools occupied by a School Board, which can make no profit in a commercial sense as tenant of the schools, the School Board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the Board might reasonably be expected to pay for the premises for use as schools. THE QUEEN *v.* SCHOOL BOARD FOR LONDON - C. A. 738

—— Metropolis — Valuation Acts — Appeal — Notice of appeal - - - 394
See METROPOLIS.

POST OFFICE—Post office order—How far transferable by delivery—Wrongful conversion - - - - - 705
See TROVER.

PRACTICE—*Appeal—Application for New Trial —Power of Court of Appeal to give Judgment—Rules of Supreme Court*, 1883, *Order LVIII., r.* 4.] On an appeal from the order of a Divisional Court, upon an application for a new trial, the Court of Appeal has power, under Order LVIII., r. 4, if all the facts are before the Court, to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. MILLAR *v.* TOULMIN - - - C.A. 603

2. —— *Chose in Action—Assignment—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.] The defendants, who were executors and trustees under a will, sent to G., one of the residuary legatees, a statement of account shewing a balance to be due to him on account of his share of the residuary estate. G., who lived in Australia, sent this account to his daughter, the plaintiff, with the following direction on it in his handwriting: "I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shewn in the above statement. . . ." Notice in writing of this document was given by the plaintiff to the defendants, but they refused to be bound by it:—*Held*, that the document was a valid assignment of the balance in the hands of the defendants, and that the plaintiff was entitled to recover the amount. HARDING *v.* HARDING [442

3. —— *Costs—Claim on Contract and Counterclaim—Costs of Issues where the Plaintiff recovers less than* 20*l. and the Defendant recovers a larger Amount—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142, *s.* 5.] In an action of contract the defendant counter-claimed. By the award of a special referee it was found that the plaintiffs were entitled on their claim to 13*l.* 12*s.* 6*d.*, and that the defendant was entitled on the counter-claim to 63*l.* 8*s.* 6*d.*:—*Held*, that by reason of the provisions of the 5th section of the County Courts Act, 1867, the plaintiffs were not entitled to the costs of the issues found for them on the claim.—*Lund* v. *Campbell* (14 Q. B. D. 821) distinguished. AHRBECKER *v.* FROST - - - - 606

4. —— *Costs—Taxation—Joinder of Plaintiffs —Separate Causes of Action—Judgment for one Plaintiff and against the other—Rules of Supreme Court*, 1883, *Order XVI., r.* 1.] Two plaintiffs joined in one action, claiming for separate and distinct causes of action. The case was referred, with power to the arbitrator to enter judgment, the costs of the cause to abide the event. The arbitrator found in favour of one plaintiff, and against the other, and entered judgment accordingly. On an application to review taxation of costs:—*Held*, reversing the order of Lord Coleridge, C.J., and Fry, L.J., that the successful plaintiff was entitled to recover from the defendant the whole of his general costs of the action, and the defendant was only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff. VISCOUNT GORT *v.* ROWNEY - - - - C. A. 625

5. —— *Costs—Trial with Jury—Jurisdiction of Judge to make Order as to Costs—Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49 *—Order LXV., r.* 1.] *Per* Lord Coleridge, C.J. Where an action is tried with a jury the exercise of the judge's jurisdiction as to costs under Order

PRACTICE—*continued.*

LXV., r. 1, was not intended by the legislature to be subject to any appeal. HUXLEY *v.* WEST LONDON EXTENSION RAILWAY COMPANY. HUGHES *v.* MERRETT. WOOD *v.* MADGE - - 373

6. —— *County Court—Appeal by Motion—Special Case—Supreme Court of Judicature Acts*, 1873 (36 & 37 *Vict. c.* 66), 1875 (38 & 39 *Vict. c.* 77), *and* 1884 (47 & 48 *Vict. c.* 61)—*Order LIX., rr.* 9, 10. All appeals from county courts to the Queen's Bench Division of the High Court must, since Order LIX., r. 10, be by notice of motion, notwithstanding the 13 & 14 Vict. c. 61, ss. 14, 15, which gave an appeal by special case. THE QUEEN *v.* SIR RUPERT KETTLE - 761

7. —— *Discovery—Interrogatories—Material Facts—Disclosure of Names of Persons, though probably to be Witnesses—Libel—Justification.*] In an action for libel the defendant pleaded that the libel was true. The substance of the libel was that the plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by the defendant had been sent round to the defendant's competitors in business. The plaintiff had in speeches and letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers and a firm of manufacturers at Birmingham, and that his informant in the matter was a solicitor of high standing at Birmingham. — In interrogatories administered by the defendant the plaintiff was asked to state the name and address of his informant, in whose hands he had seen the copy of the letter, and the names and addresses of the persons to whom the letter had been sent, and in whose possession the two letters existed; but he refused to do so on the ground that he intended to call those persons as his witnesses at the trial: —*Held*, that the defendant was entitled to discovery of the names and addresses of such persons as being a substantial part of facts material to the case upon the issue on the plea of justification. MARRIOTT *v.* CHAMBERLAIN - - C.A. 154

8. —— *Discovery of Documents—Interrogatory—Sufficient Affidavit of Documents.*] In an action for the recovery of land the defendant claimed that certain documents mentioned in his affidavit of documents were privileged from production, on the ground that they supported his title and did not contain anything impeaching his defence or supporting the plaintiff's case. The defendant's affidavit was sufficient on the face of it. The plaintiffs proposed to administer interrogatories to the defendant for the purpose of shewing that the documents in question supported the plaintiff's title, and therefore that they were not privileged from production:—*Held*, that the interrogatories were inadmissible.—*Jones* v. *Monte Video Gas Co.* (5 Q. B. D. 556), and *Hall* v. *Truman, Hanbury & Co.* (29 Ch. D. 307) followed. NICHOLL *v.* WHEELER - - - - - C. A. 101

9. —— *Interpleader—Goods taken in Execution—Title of Third Party—Right of Execution Creditor to set up against Claimant.*] In an interpleader issue between the execution creditor and a claimant it is open to the execution creditor to defeat the claim by establishing a title to the goods in a third party which is superior even to his own.—The claimant, having let goods to W., became bankrupt. He did not inform his trustee that he owned these goods, and W., being unaware of the bankruptcy, continued to pay him money for the hire of them. The goods were taken in execution under a judgment recovered against W. —In an interpleader issue between the claimant and the execution creditor:—*Held*, that the execution creditor was entitled to judgment, that being primâ facie, in possession, he could shew that the claimant had no right to the goods, and that he was entitled for that purpose to set up against the claimant the title of the trustee in bankruptcy. RICHARDS *v.* JENKINS - 544

10. —— *Interpleader—Jurisdiction of Master—Summary Decision—Appeal to Judge at Chambers—Appeal to Court of Appeal—Order LIV., rr.* 12, 21; *Order LVII., rr.* 8, 11.] On an interpleader summons at chambers the master decided, at the request of one of the parties, and having regard to the value of the subject-matter in dispute, to dispose of the claims in a summary manner, and he adjourned the summons for the production of evidence. The claimant objected that it was a case for an issue, and appealed to a judge at chambers, who dismissed the appeal on the ground that the decision of the master was final. An appeal from the judge at chambers to the Divisional Court was dismissed. On appeal to the Court of Appeal:—*Held*, that the decision of the master was a summary decision within Order LVII., r. 8, and that therefore *Waterhouse* v. *Gilbert* (15 Q. B. D. 569) applied, and the Court of Appeal could not entertain the appeal.—*Quære*, whether under Order LIV., r. 21, all decisions of a master, including a decision in a summary way in interpleader, are not the subject of appeal to a judge at chambers. BRYANT *v.* READING - - - - C. A. 128

11. —— *Notice of Motion, Amendment of—Appeal from Chambers—Notice for Day not in the Sittings.*] A notice of motion having been given for a day not in the sittings, the Court amended the notice in this respect. WILLIAMS *v.* DE BOINVILLE - - - - - - 180

12. —— *New Trial—Verdict against Weight of Evidence—Principle on which new Trial allowed—Report of Judge.*] A new trial of an action not to be granted on the ground that the verdict was against the weight of evidence if the verdict was one which the jury, acting as reasonable men, could have found. *Solomon* v. *Bitton*, (8 Q. B. D. 176) explained. WEBSTER *v.* FRIEDEBERG [C. A. 736

13. —— *Pleading—Seduction—Administering Drugs to procure Abortion—Civil or criminal Proceeding — Application to strike out Paragraph.*] In an action for the seduction of the plaintiff's daughter a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion:—*Held*, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute. APPLEBY *v.* FRANKLIN - - - 93

PRACTICE—*continued.*

14. —— *Solicitor, Privilege of, to be sued only in High Court—Mayor's Court.*] A solicitor of the High Court, who had also been admitted a solicitor in the Mayor's Court, was sued in the latter court:—*Held*, that he was not entitled to have the action removed into the High Court on the ground of the privilege of a solicitor of the High Court to be sued in that court only. DAY *v.* WARD - - - - - - 703

15. —— *Writ specially indorsed—Action for Recovery of Land—Landlord and Tenant—Rules of Supreme Court*, 1883, *Order III., r.* 6 (*F.*).] In an action for the recovery of land by a landlord against a tenant, the writ of summons can be specially indorsed under Order III., r. 6 (F.), only when the plaintiff was party to the lease or agreement under which the hereditaments have been held, or when the defendant has paid rent to the plaintiff, thereby acknowledging his title, or when the defendant is otherwise estopped from denying the plaintiff's title. CASEY *v.* HELLYER [C. A. 97

16. —— *Original Writ for Service within the Jurisdiction—Issue of concurrent Writ for Service out of the Jurisdiction—Enlargement of Time—Sole Defendant—Rules of Supreme Court*, 1883, *Order VI., rr.* 1, 2; *VIII., r.* 1; *LXIV., r.* 7.] Under the Rules of Court, 1883, Order VI., rr. 1, 2, the Court has power to give leave for the issue of a concurrent writ for service out of the jurisdiction, although the original writ was issued for service within the jurisdiction and has been renewed, and although there is only one defendant to the action. And where the writ has been renewed such leave may be given, notwithstanding that the enlargement of time for issuing a concurrent writ may affect the operation of the Statute of Limitations. SMALPAGE *v.* TONGE [C. A. 644

17. —— *Leave to issue Writ for Service out of the Jurisdiction—Company with Registered Office in Scotland—Action for Breach of Contract—Companies Clauses Act* (8 *&* 9 *Vict. c.* 16), *s.* 135—*Order XI., r.* 1 (*c*) *and* (*e*).] An insurance company, whose registered office was in Scotland, and whose secretary resided there, but which also had agencies and a chief office within the jurisdiction of the High Court, issued a policy through an agent within the jurisdiction, to whom the premiums were paid. The company having refused to pay a claim on the policy:—*Held*, that it was not domiciled or ordinarily resident within the jurisdiction, and that leave to issue a writ for service out of the jurisdiction could not be granted. JONES *v.* SCOTTISH ACCIDENT INSURANCE COMPANY [421

18. —— *Writ of Summons—Service of Writ out of the Jurisdiction—Order XI., r.* 1 (*e*)—*Order limiting Plaintiff's Right to recover at the Trial.*] An order having been obtained under Order XI., r. 1 (*e*), for service of notice of a writ out of the jurisdiction in an action for the price of goods supplied, and service having been effected accordingly, the defendant applied to a judge at chambers to rescind the order and set aside the subsequent proceedings under it. The judge, being doubtful on the affidavits used whether there had been any breach of the contract within the jurisdiction, refused the application, but ordered that the plaintiff's claim should be limited to the recovery of the price of goods in respect of which it might appear at the trial that the writ could have been properly served out of the jurisdiction:—*Held* (reversing the judgment of the Queen's Bench Division), that the order of the judge at chambers was rightly made. THOMAS *v.* DUCHESS DOWAGER OF HAMILTON C. A. 592

—— Appeal—Court of Appeal—Criminal cause or matter—Special case stated under Summary Jurisdiction Act - 344
See HIGHWAY. 2.

—— Trial at bar—Prerogative of Crown—Action against Board of Trade—Change of venue - - - - - 658
See CROWN.

PRINCIPAL AND AGENT—Insurance (Marine)—Concealment—Broker employed by assured, but not broker through whom policy effected - - - 553
See INSURANCE (MARINE).

PRINCIPAL AND SURETY—Indemnity against covenant to leave premises in repair—Bankruptcy of surety during term—Liability, present or future, certain or contingent - - - - 770
See LANDLORD AND TENANT. 2.

PRIORITY—Debts—Wages or salary—Four months before receiving order—Bankruptcy - - - - - 4
See BANKRUPTCY. 13.

PRISON—*Committal to, of Unqualified Person acting as Solicitor—Treatment in Prison—"Criminal Prisoner," Meaning of—Solicitors Acts* (6 *&* 7 *Vict. c.* 73), *ss.* 2, 32 (23 *&* 24 *Vict. c.* 127), *s.* 26—*Prison Acts* (28 *&* 29 *Vict. c.* 126), *ss.* 4, 67 (40 *&* 41 *Vict. c.* 21), *s.* 41.] A person committed to prison under 6 & 7 Vict. c. 73, s. 32, and 23 & 24 Vict. c. 127, s. 26, for acting as a solicitor though not duly qualified, is not a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4, which enacts that "criminal prisoner shall mean any prisoner charged with or convicted of a crime." Such a prisoner is a person imprisoned under a rule or order of Court within 40 & 41 Vict. c. 21, s. 41, and is therefore entitled to be treated as a misdemeanant of the first division pursuant to 28 & 29 Vict. c. 126, s. 67, which provides that such a misdemeanant shall not be deemed to be a criminal prisoner within the meaning of that Act. OSBORNE *v.* MILMAN - - - - 514

PRIVILEGE—Solicitor—Privilege to be sued only in High Court—Mayor's Court 703
See PRACTICE. 14.

PROOF—Bankruptcy—Unreasonable rejection by trustee—Costs - - - 488
See BANKRUPTCY. 14.

RAILWAY—*Passenger's Luggage—Luggage to accompany Passenger—Delivery to Porter—Loss by Negligence of Porter—Liability of Company.*] The female plaintiff arrived at a station on the defendants' railway forty minutes before the time at which the train by which she intended to travel was to start. She had a bag and two

RAILWAY—*continued.*
other articles of luggage, which a porter took into the station. She saw the two labelled, and told the porter she wished the bag to be put in the train with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe, and she then went to meet her husband and get a ticket. They returned together in ten minutes and found that the two labelled articles had been put into the van but that the bag was not forthcoming. At the trial in the county court the judge found that the porter had been negligent in not being in readiness to put the bag into the carriage on the return of the female plaintiff, and that the defendants were liable for its loss:—*Held* (by Lord Esher, M.R., and Lindley, L.J., Lopes, L.J., dissentiente) that there was evidence to warrant the judge in finding that the bag was entrusted to the porter for the purpose of the transit, and not to be taken charge of while the journey was suspended, and that he was acting within the scope of his authority in taking charge of it.—By Lord Esher, M.R., that so long as passenger's luggage intended to be taken in the train with the passenger is in the custody of a porter for the purpose of the transit, either at the commencement or conclusion of the journey, the railway company are common carriers of it, but that while it is in the carriage and partially under the control of the passenger, the railway company are not common carriers, but are liable as carriers for negligence only.—*Bergheim* v. *South Eastern Ry. Co.* (3 C. P. D. 221) explained. Bunch *v.* Great Western Railway Company - - - - **C. A. 215**

RAILWAY COMMISSIONERS — *Special Case*—*Appeal from Divisional Court to the Court of Appeal*—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 45—"*Passing of the Act.*"] No appeal lies to the Court of Appeal from a decision of a Divisional Court on a special case stated by the Railway Commissioners under s. 26 of the Regulation of Railways Act, 1873. Hall *v.* London, Brighton, & South Coast Railway Company [**C. A. 230**

RAILWAY—Land injuriously affected—Lands and Railways Clauses Consolidation Acts—Easement—Way of necessity **12**
See Compensation.

RATS—Ship—Damage to goods—Bill of lading—Exceptions—Dangers and accidents of the seas - - - - **670**
See Ship.

RECITAL—Agreement—Insufficient statement—Bill of sale - - - - **77**
See Bill of Sale. 5.

REGISTRAR — County court — Bankruptcy — Order of Divisional Court—Refusal to carry out order of Court of Appeal—Procedure to compel obedience - **389**
See Bankruptcy. 15.

REGISTRATION — Deeds — Middlesex — Fees chargeable—7 Anne, c. 20 - **783**
See Middlesex.

—— Judgment—Elegit—Sale of land - **743**
See Judgment Creditor.

RESTITUTION—Criminal law—Goods obtained by false pretences—Proceeds of sale—24 & 25 Vict. c. 96, ss. 1, 100 - **598**
See Criminal Law. 3.

RETURNING OFFICER—Charges—Taxation—County court—Application to registrar
See Parliament. 2. [**788**

—— Costs—Taxation—Registrar of county court—Jurisdiction to review taxation **96**
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RULES:—
—— **Order III., r. 6 (F)** - - - **97**
See Practice. 15.
—— **Order VI., rr. 1, 2** - - - **644**
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—— **Order VIII., r. 1** - - - **644**
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—— **Order IX., r. 6** - - - - **755**
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—— **Order XI., r. 1 (c) and (e)** - - **421**
See Practice. 17.
—— —— **r. 1 (e)** - - - - **592**
See Practice. 18.
—— **Order XVI., r. 1** - - - **625**
See Practice. 4.
—— **Order XLII., r. 10** - - - **755**
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—— **Order LIV., rr. 12, 21** - - - **128**
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—— **Order LVII., rr. 8, 11** - - - **128**
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—— **Order LVIII., r. 4** - - - **603**
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—— —— **r. 15** - - - - **351**
See Bankruptcy.
—— **Order LIX., rr. 9, 10** - - - **761**
See Practice. 6.
—— **Order LXIV., r. 7** - - - **644**
See Practice. 16.
—— **Order LXV., r. 1** - - - **373**
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SALE OF GOODS—Property obtained by false pretences—Pledge to innocent party—Sale by him—Conviction of fraudulent pledgor—Power to order restitution of proceeds of sale - - - **598**
See Criminal Law. 3.

SCHOOL BOARD—Election—Vote by ballot—Validity of ballot papers - - **805**
See Elementary Education.

—— Poor-rate—Occupation of schools—Rateable value - - - - **738**
See Poor-rate. 3.

SECURITY FOR COSTS—Appeal—Bankruptcy—Increasing amount of deposit—"Special circumstances" - - - **351**
See Bankruptcy.

SEDUCTION—Administering drugs to procure abortion—Pleading - - **93**
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SEIZURE—Bill of sale—Goods in public highway - - - - - **234**
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SEPARATE ESTATE—General power of appointment—Married woman trading separately from her husband—Bankruptcy *See* BANKRUPTCY. 9. [521

—— Restraint upon anticipation — Judgment summons—Proof of means - 147 *See* HUSBAND AND WIFE.

—— Settlement—General power of appointment —Bankruptcy - - - 167 *See* BANKRUPTCY. 8.

SERVICE—Out of jurisdiction—Company with registered office in Scotland—Action for breach of contract - - - 421 *See* PRACTICE. 17.

—— Out of jurisdiction—Concurrent writ—Enlargement of time—Sole defendant 644 *See* PRACTICE. 16.

—— Out of jurisdiction—Order limiting plaintiff's right to recover at the trial 592 *See* PRACTICE. 18.

SESSIONS — Appeal — Notice — Bastardy — Grounds of appeal - - - 49 *See* BASTARDY.

SETTLEMENT—Intent to defeat or delay creditors—Pending action - - 290 *See* BANKRUPTCY. 11.

—— Invalidity—Bankruptcy—Majority of creditors opposed to litigation—Proceedings in name of trustee—Indemnity - 1 *See* BANKRUPTCY. 10.

—— Life estate—Forfeiture in event of bankruptcy or alienation - - 275 *See* BANKRUPTCY. 7.

—— Poor law—Widow - - - 817 *See* POOR LAW.

SEWERING AND PAVING—Street—Apportionment of expenses—Right to dispute liability before justices - - 107 *See* LOCAL GOVERNMENT ACTS. 4.

—— Street—Public Health Act, 1875, ss. 4, 150, 257—Apportionment of expenses—How far conclusive - - - 30 *See* LOCAL GOVERNMENT ACTS. 5.

SHIP—*Charterparty—Bill of Lading—Exceptions —"Dangers and Accidents of the Seas"—Damage caused by Rats.*] A ship was chartered, and a cargo shipped, under a charterparty and bills of lading which excepted "dangers and accidents of the seas." During the voyage the cargo was damaged by sea-water escaping from a pipe on board the ship, owing to the pipe having been gnawed through by rats.—In an action by the owners of the cargo against the shipowners to recover the amount of the damage so caused:—*Held*, that the damage was not within the exception, and the defendants were liable. PANDORF *v.* HAMILTON - - - - C. A. 670

2. —— *Charterparty—Bill of Lading—How far controlling Charterparty—Measure of Damages —Advanced Freight subject to Insurance.*] In an action against a shipowner by the vendor of goods sold "to arrive" for the loss of the goods, the measure of the damages is the price at which the goods were sold and not the market price at the port of destination on the day on which the ship would in due course have arrived.—A cargo of seed was shipped by the plaintiffs on the

SHIP—*continued.*

defendants' ship under a charterparty which provided, inter alia, that the master was to sign bill of lading at any rate of freight, and as customary at port of loading, without prejudice to the stipulations of the charterparty; sufficient cash for ship's disbursements to be advanced if required to the captain by charterers on account of freight, subject to insurance only. The bill of lading contained an exception, which was not in the charterparty, protecting the owners from liability for any act, neglect, or default of the master.—Money was advanced under the charterparty at the port of loading for disbursements. The plaintiffs did not insure this sum. The cargo was lost by the negligence of the master:—*Held*, that the defendants were liable, that the clause in the bill of lading limiting their liability could not control the contract contained in the charterparty, but that the plaintiffs were not entitled to deduct from the freight due to the defendants the sum advanced subject to insurance, for that the meaning of that clause was that the shipowners were to allow to the shippers a sum equal to the premium payable on the insurance of the advanced freight, and that the plaintiffs could not, if they did not insure, deduct the money so advanced from the freight due to the defendants. RODOCONACHI *v.* MILBURN BROTHERS [316

—— Detention for survey—Action against Board of Trade—Right to trial at bar - 658 *See* CROWN, PREROGATIVE OF.

SOLICITOR—Privilege to be sued only in High Court—Mayor's Court - - 703 *See* PRACTICE. 14.

—— Unqualified person—Committal to prison—Treatment in prison - - 514 *See* PRISON.

STATUTES:—

22 Hen. 8, c. 5 - - - - 424 *See* BRIDGE.

13 Eliz. c. 5 - - - - 290 *See* BANKRUPTCY. 11.

7 Anne, c. 20 - - - - 783 *See* MIDDLESEX.

6 Geo. 4, c. 81, s. 26 - - - 132 *See* LICENSING ACTS.

4 & 5 Wm. 4, c. 85, s. 17 - - - 132 *See* LICENSING ACTS.

5 & 6 Wm. 4, c. 50, s. 21 - - - 424 *See* BRIDGE.

—— —— ss. 94, 95 - - - 344 *See* HIGHWAY. 2.

6 & 7 Wm. 4, c. 96, s. 1 - - - 651 *See* POOR-RATE.

6 & 7 Vict. c. 73, ss. 2, 32 - - - 514 *See* PRISON.

7 & 8 Vict. c. 101, s. 4 - - - 49 *See* BASTARDY.

8 & 9 Vict. c. 16, s. 135 - - - 421 *See* PRACTICE. 17.

8 & 9 Vict. c. 18, s. 63 - - - 447 *See* COMPENSATION. 2.

—— —— s. 68 - - - - 12 *See* COMPENSATION.

STATUTES—*continued.*

8 & 9 Vict. c. 20, ss. 6, 16 - - - 12
See Compensation.

10 & 11 Vict. c. 15, s. 14 - - - 619
See Gas Company.

10 & 11 Vict. c. 17, ss. 28, 32 - - 475
See Waterworks.

15 & 16 Vict. c. 84, s. 26 - - - 475
See Waterworks.

17 & 18 Vict. c. 104, Parts VI. and VII. 795
See Negligence.

17 & 18 Vict. c. 125, s. 15 - - 114
See Local Government Acts.

18 & 19 Vict. c. 120, s. 105 - - 212
See Landlord and Tenant. 3.

20 & 21 Vict. c. 85, ss. 33, 52 - - 718
See Bankruptcy. 6.

23 Vict. c. 27, s. 19 - - - 132
See Licensing Acts.

23 & 24 Vict. c. 38 - - - - 743
See Judgment Creditor.

23 & 24 Vict. c. 127, s. 26 - - 514
See Prison.

24 & 25 Vict. c. 96, ss. 1, 100 - - 598
See Criminal Law. 3.

24 & 25 Vict. c. 100, s. 20 - - - 359
See Criminal Law. 4.

25 & 26 Vict. c. 61, s. 18 - - - 344
See Highway. 2.

—— —— s. 39 - - - - 364
See Highway.

25 & 26 Vict. c. 102, s. 96 - - - 212
See Landlord and Tenant. 3.

26 & 27 Vict. c. 29, s. 6 - - - 327
See Criminal Law. 2.

27 & 28 Vict. c. 112 - - - 743
See Judgment Creditor.

28 & 29 Vict. c. 104, s. 46 - - 658
See Crown.

28 & 29 Vict. c. 126, ss. 4, 67 - - 514
See Prison.

30 & 31 Vict. c. 35, ss. 6, 7 - - 323
See Criminal Law.

30 & 31 Vict. c. 84, s. 31 - - - 191
See Vaccination.

30 & 31 Vict. c. 142, s. 5 - - - 606
See Practice. 3.

32 & 33 Vict. c. 27, ss. 8, 19 - - 765
See Inn.

32 & 33 Vict. c. 62, s. 5 - - - 147
See Husband and Wife.

—— —— —— - - - - 718
See Bankruptcy. 6.

—— —— s. 27 - - - - 488
See Bankruptcy. 14.

32 & 33 Vict. c. 67, s. 4 - - - 738
See Poor-rate. 3.

—— —— s. 33 - - - - 394
See Metropolis.

32 & 33 Vict. c. 71, ss. 4, 15 - - 521
See Bankruptcy. 9.

STATUTES—*continued.*

32 & 33 Vict. c. 71, s 31 - - - 770
See Landlord and Tenant. 2.

33 & 34 Vict. c. 29, s. 4, sub-s. 4, s. 7 - 765
See Inn.

33 & 34 Vict. c. 78 - - - - 118
See Tramway.

34 & 35 Vict. c. 113, ss. 17, 24 - - 475
See Waterworks. 2.

35 & 36 Vict. c. 33, Sched. II. - - 805
See Elementary Education Acts.

36 & 37 Vict. c. 66 - - - - 761
See Practice. 6.

—— —— s. 25, sub-s. 6 - - - 442
See Practice. 2.

36 & 37 Vict. c. 66, s. 45 - - - 230
See Railway Commissioners.

—— —— s. 47 - - - - 344
See Highway. 2.

—— —— s. 49 - - - - 373
See Practice. 5.

36 & 37 Vict. c. 86, Sched. 11. - - 805
See Elementary Education Acts.

38 & 39 Vict. c. 55 - - - - 114
See Local Government Acts.

—— —— ss. 4, 150, 257 - - - 30
See Local Government Acts. 5.

—— —— ss. 5, 10, 12, 264, 341 - - 139
See Local Government Acts. 3.

38 & 39 Vict. c. 55, ss. 94, 95, 96 - 584
See Local Government Acts. 2.

38 & 39 Vict. c. 77 - - - 761
See Practice.

38 & 39 Vict. c. 84, s. 4 - - - 96
See Parliament.

—— —— —— - - - - 788
See Parliament. 2.

38 & 39 Vict. c. 55, s. 150 - - - 107
See Local Government Acts. 4.

39 & 40 Vict. c. 61, s. 35 - - - 817
See Poor Law.

39 & 40 Vict. c. 80, s. 10 - - - 658
See Crown.

40 & 41 Vict. c. 21, s. 41 - - - 514
See Prison.

41 & 42 Vict. c. 31, ss. 3, 4 - - 690
See Bill of Sale. 11.

—— —— s. 8 - - - - 204
See Bill of Sale. 2.

—— —— s. 10 - - - - 74
See Bill of Sale. 10.

41 & 42 Vict. c. 77, ss. 3, 4, 7 - - 364
See Highway.

—— —— ss. 3, 5, 7, 10 - - - 344
See Highway. 2.

42 & 43 Vict. c. 49, s. 31, sub-s. 2 - 49
See Bastardy.

43 & 44 Vict. c. 42 - - - - 122
See Master and Servant. 4.

—— —— s. 1, sub-s. 1 - - - 414
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43 & 44 Vict. c. 42, s. 1, sub-s. 1 - - 187
See Master and Servant. 3.

44 & 45 Vict. c. 41, ss. 2, 7 - - 259
See Bill of Sale. 3.

45 & 46 Vict. c. 43, ss. 3, 9 - - 690
See Bill of Sale. 11.

—— —— ss. 4, 8, 9 - - - 402
See Bill of Sale. 6.

—— —— ss. 4, 11 - - - - 74
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—— —— ss. 7, 9 - - - - 459
See Bill of Sale. 9.

—— —— —— - - - - 484
See Bill of Sale. 4.

—— —— ss. 7, 9, 13 - - - 259
See Bill of Sale. 3.

—— —— s. 9 - - - - 77
See Bill of Sale. 5.

—— —— —— - - - - 80
See Bill of Sale. 8.

—— —— —— - - - - 204
See Bill of Sale. 2.

—— —— —— - - - - 336
See Bill of Sale. 7.

—— —— s. 13 - - - - 234
See Bill of Sale. 12.

45 & 46 Vict. c. 50, s. 11, sub-s. 3, s. 51 - 44
See Municipal Election.

45 & 46 Vict. c. 75, s. 1 - - - 147
See Husband and Wife.

—— —— —— sub-s. 2 - - - 177
See Husband and Wife. 2.

—— —— —— sub-s. 5 - - - 521
See Bankruptcy. 9.

—— —— —— —— s. 19 - - 167
See Bankruptcy. 8.

46 & 47 Vict. c. 51, ss. 3, 6, 53 - - 327
See Criminal Law. 2.

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*g*) - 303
See Bankruptcy. 2.

—— —— —— —— - - - 357
See Bankruptcy. 3.

—— —— —— —— - - - 755
See Bankruptcy. 4.

—— —— Sched. II., rr. 12, 13 - - 728
See Bankruptcy. 12.

—— —— ss. 18, 27, 168 - - - 238
See Bankruptcy. 16.

—— —— ss. 18, 28 - - - 244
See Bankruptcy. 17.

—— —— s. 24 - - - - 167
See Bankruptcy. 8.

—— —— ss. 40, 70 (sub-s. 3), 101 - 4
See Bankruptcy. 13.

—— —— ss. 44, 152 - - - 521
See Bankruptcy. 9.

—— —— s. 45 - - - - 182
See Bankruptcy. 5.

STATUTES—*continued.*

46 & 47 Vict. c. 52, s. 47 - - - 290
See Bankruptcy. 11.

—— —— s. 89 - - - - 488
See Bankruptcy. 14.

—— —— s. 97 (sub-s. 3), s. 104, sub-s. 2 (*a*) (*b*) - - - - - 275
See Bankruptcy. 7.

—— —— s. 103, sub-s. 5 - - - 718
See Bankruptcy. 6.

46 & 47 Vict. c. 61, ss. 49, 50, 51, 52, and 2nd Sched. - - - - 714
See Landlord and Tenant.

47 & 48 Vict. c. 9, s. 2 - - - 275
See Bankruptcy. 7.

47 & 48 Vict. c. 41, s. 2 - - - 66
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STREET—Improvement expenses—Appointment by surveyor, how far conclusive—Excess of jurisdiction - - - 30
See Local Government Acts. 5.

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TIME, COMPUTATION OF — Bankruptcy — Priority of debts—Wages or salary—Four months before date of receiving order - - - - - 4
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TRADER — Bankruptcy — Accounts, mode of keeping - - - - 244
See Bankruptcy. 17.

TRAMWAY—*Liability for Accident—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78)—"*Act or default.*"] The General Tramways Act, 1870 (33 & 34 Vict. c. 78), regulating Tramway companies authorized by statute to use tramcars in the public streets, enacts by s. 55 that "The promoters or lessees, as the case may be, shall be answerable for all accident, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages. . . .":—*Held*, that s. 55 applies only to a wrongful act or default, and does not make the promoters or

TRAMWAY—*continued.*

lessees answerable for mere accident caused without negligence by their use of tramcars. BROCKLEHURST *v.* MANCHESTER, BURY, ROCHDALE, AND OLDHAM STEAM TRAMWAYS COMPANY - 118

TRINITY HOUSE—How far department of Crown —Liability for negligence - 795
See NEGLIGENCE.

TROVER—*Conversion—Post Office Order cashed through Bankers — Negotiable Instrument — Estoppel.*] The plaintiffs banked with the defendants. It was the duty of the plaintiffs' secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank to the credit of the plaintiffs. The secretary without the knowledge of the plaintiffs kept an account at the defendants' bank. He paid into the defendants' bank to his own credit certain post office orders belonging to the plaintiffs which the defendants subsequently cashed. The Post Office regulations with regard to post office orders provide that, when presented for payment by a banker, they shall be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is written or stamped upon it:—*Held*, that there had been a wrongful conversion of the post office orders above mentioned by the defendants; and that the regulations of the Post Office with regard to the payment of post office orders presented through bankers did not give to those instruments in the hands of bankers the character of instruments transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin* v. *Robarts* (1 App. Cas. 476), and thus give the defendants a good title to the post office orders independently of the authority given to the plaintiffs' secretary. FINE ART SOCIETY *v.* UNION BANK OF LONDON, LIMITED - - - - C. A. 705

TRUSTEE—Bankruptcy — Refusal to take proceedings—Right to use name—Indemnity against - - - 1
See BANKRUPTCY. 10.

VACCINATION—*Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Summons—Default of Appearance of Parent — Power to make Vaccination Order.*] By the Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 31, upon an information that a notice to the parent of a child to procure its being vaccinated has been disregarded, a justice may summon such parent to appear with the child before him, and "upon the appearance" the justice must make an order directing such child to be vaccinated. By s. 33, the 11 & 12 Vict. c. 43 (Jervis's Act), except s. 11 thereof, shall apply to all proceedings to be taken under the Act:—*Held*, that an order for the vaccination of a child may be made under s. 31 of the Vaccination Act, 1867, on a parent duly summoned even when he has failed to appear upon the summons. THE QUEEN *v.* A JUSTICE FOR THE CINQUE PORTS [191

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See METROPOLIS.

VENDOR AND PURCHASER—Equitable mortgage—Elegit—Registration of judgment —Sale of land - - - 743
See JUDGMENT CREDITOR.

VENUE—Change of—Action against Board of Trade—Prerogative of Crown - 658
See CROWN.

WATERWORKS — *Highway — Nuisance — Fire-plug—Wearing away of Road.*] A fire-plug had been lawfully fixed in a highway by the defendants. Originally the top of the fire-plug had been level with the pavement of the highway, but in consequence of the ordinary wearing away of the highway the fire-plug projected half an inch above the level of the pavement. The fire-plug itself was in perfect repair. The plaintiff, whilst passing along the highway, fell over the fire-plug and was hurt:—*Held*, that, as the fire-plug was in good repair, and had been lawfully fixed in the highway, no action by the plaintiff would lie against the defendants.—*Kent* v. *Worthing Local Board* (10 Q. B. D. 118) commented on. MOORE *v.* LAMBETH WATERWORKS COMPANY [C. A. 462

2. —— *Water Company, Power of, to do Works in a Street—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 32—*Metropolis Water Act*, 1852 (15 & 16 *Vict. c.* 84), *s.* 26—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *ss.* 17, 24.] The 28th section of the Waterworks Clauses Act, 1847, provides that the undertakers may open and break up the soil and pavement of streets within their district and lay down and place pipes, conduits, service pipes, and other works and engines, and do all other acts which they shall from time to time deem necessary for supplying water to the inhabitants of the district. The 32nd section of the same Act provides that, when the undertakers open or break up the road or pavement of any street they shall, with all convenient speed, complete the work for which the same shall be broken up and fill in the ground and reinstate and make good the road or pavement so opened or broken up.—*Held*, that the power given by the 28th section includes any works which the undertakers may deem necessary for the purpose of regulating the supply of water, and is not confined to the laying down of apparatus underground, but enables the undertakers to place such works on the surface of the street as may not be inconsistent with the substantial reinstatement of the road or pavement in its previous condition or create a nuisance; and therefore that a water company was authorized by the section to place in the pavement of a street covers or guard boxes to protect stop-valves placed for the purpose of regulating the supply of water in the communication pipes, by which water was supplied to premises in the street, such covers or guard boxes not creating a nuisance or being inconsistent with the substantial reinstatement of the pavement. EAST LONDON WATERWORKS COMPANY *v.* THE VESTRY OF ST. MATTHEW, BETHNAL GREEN - C. A. 475

—— Poor rate—Principle of assessment—Land occupied by local authority for public purposes - - - - 384
See POOR-RATE. 2.

WAYWARDEN—Highway — Summary proceeding for non-repair — Admission of liability - - - - - 344
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—— "Works" - - - - - - 187
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See PRACTICE. 16.

WRIT—*continued.*

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